DOCUMENT RESUME

ED 233 468 EA 016 030

AUTHOR	Dellinger, Anne M.
TITLE	North Carolina School Law: The Principal's Role.
INSTITUTION	North Carolina Univ., Chapel Hill. Institute of Government.
PUB DATE	81
NOTE	112p.
AVAILABLE FROM	Publications, Institute of Government, Knapp Building 059A, University of North Carolina at Chapel Hill, Chapel Hill, NC 27514 ($5.00).
PUB TYPE	Books (010) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC05 Plus Postage.
DESCRIPTORS	*Administrator Responsibility; *Administrator Role; Corporal Punishment; *Court Litigation; Discipline; Educational Finance; Elementary Secondary Education; Expulsion; *Legal Responsibility; *Principals; *School Law; Student Rights; Student Transportation; Student Welfare; Supervision; Suspension
IDENTIFIERS	North Carolina

ABSTRACT

This book outlines the legal aspects of the principal's role in North Carolina and is intended to be used as an instructive and advisory aid when formulating school policy. The principal's legal status, including a definition of authority and employment rights, is discussed. The author delineates the principal's responsibilities for student welfare as follows: enforcing attendance law, identifying neglect and abuse, guarding children's health and safety, regulating access to student records, and placing students in appropriate educational programs. Asserting a principal's authority to discipline, the author differentiates between student First Amendment rights and negative rights (freedom from discrimination, right to due process, right to privacy of school records, and certain protections of the Fourth Amendment). Since many student rights have been established by federal court decisions and are in a state of flux, principals are advised to learn the areas in which legal difficulties are likely to arise and seek direction in those areas. The author covers the fairness of school rules and methods of enforcement, legal consideration of the duties a principal has as a supervisor, school financing, and duties involved in maintaining school property and supervising school transportation systems. In describing the principal's liability the author lists the statutes and penalties involved in North Carolina law. (MD)

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North Carolina
SCHOOL LAW
THE PRINCIPAL'S ROLE

Anne M. Dellinger

EA 015 030

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INTRODUCTION

This book is for everyone who needs to understand the legal aspects of the principal's role—school board members, school attorneys, superintendents, teachers, and parents. But above all, it is for principals themselves and their assistants, who occupy a challenging position that is in many ways the most crucial in the whole educational structure.

The principal's job can be difficult—the proof is a recent poll in which 28 per cent of principals surveyed plan to leave education entirely in the near future. Fear of making a legal mistake and even perhaps incurring liability rank high among the principal's concerns. In the hope that it will lessen the fear, this book is dedicated to the more than 3,000 principals and assistant principals of North Carolina.

Readers, most of whom are not lawyers, may need a brief explanation of the court system in order to assess the varying importance of the cases and legal principles cited here. State and federal law operate simultaneously. A case brought in state court in North Carolina is tried in either district or superior court in the county where the alleged violation occurred; it then may be appealed to the Court of Appeals and finally to the State Supreme Court. A decision of either appellate court is binding throughout the state.

Under the federal judicial system, each state is divided into one or more districts; North Carolina has three federal districts. A case brought in federal court is tried in the eastern, middle, or western federal district court, depending usually on where the alleged violation occurred, and the decision in the case is binding only within that district. Suppose, for example, that a case in which a violation of students' civil rights is charged arises in Currituck County; that case will probably be tried in the eastern district, and the law it makes need not necessarily be followed in Mecklenburg, which is in the western district. A federal case may be appealed to the federal circuit court of appeals that has jurisdiction in the locality where the case arose. There are twelve circuit courts of appeals. North Carolina falls within the Fourth Circuit, along with South Carolina, Virginia, West Virginia, and Maryland. Decisions of the Fourth Circuit Court of Appeals are binding throughout the five states it serves. An appeal may be taken from the Fourth Circuit to the United States Supreme Court. A decision of the Supreme Court is binding throughout the United States.

Remembering this structure, readers can better judge the weight to be given any particular legal opinion. The federal decisions that North Carolina school officials must obey are those of the United States Supreme Court, final (unappealed) decisions of the Fourth Circuit Court of Appeals, and unappealed decisions of the federal district court in the district where the school system is located. Officials must also conform to decisions of the State Supreme Court, final decisions of the state Court of Appeals, and unappealed decisions of trial courts in their judicial district. Since no binding decisions exist on the majority of school law issues, cases from other jurisdictions are frequently mentioned here. Readers should consider these opinions instructive and advisory aids to formulating school policies in the absence of binding law.

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Chapel Hill
Fall 1980

Chapter 1

THE PRINCIPAL'S LEGAL STATUS

Sources of His Authority

Most of a principal's authority comes to him from others. To begin with the top of the hierarchy of power, the Tenth Amendment of the United States Constitution reserves to the states or to the people those powers not specifically assigned to the federal government. Education has traditionally been among the most important functions performed by the states.[1] The Constitution of North Carolina guarantees the people a "general and uniform system of free public schools." It assigns the General Assembly financial responsibility for schools but allows the legislature to delegate any portion of this responsibility to local governments. The Constitution also creates a State Board of Education and the office of Superintendent of Public Instruction to supervise and administer the schools.[2]

By statute the General Assembly has created local boards of education and assigned them a large number of powers—in fact, all education powers that are not specifically given to another person or institution.[3] Local boards employ a chief executive officer, the superintendent, to supervise and administer the schools of the unit and also entrust the supervision of each school to a principal. The principal, then, is the eventual recipient of the authority to educate that (a) belongs to the states by virtue of the federal and state constitutions; (b) is delegated by the state of North Carolina to the General Assembly, the State Board of Education, and local boards of education; and (c) is delegated again by a local board to its superintendent and, finally, by the board and superintendent to principals.

Besides exercising the delegated authority of others, principals have specific responsibilities assigned them by state statute. The statutory references to principals are too numerous to list here; nor is a listing necessary, since each provision will be discussed or noted elsewhere in this book. The general point to remember about the principal's statutory rights and duties is that they must always be seen in the context of the legal framework noted in the preceding paragraph. A principal cannot lawfully act in opposition to the school board and superintendent; he is meant to act in conjunction with them, carrying out their policies. For example, North Carolina's statutes describe the principal as "the executive head of a school"[4] with the "authority to grade and classify pupils and exercise discipline,"[5] but these statutes can be correctly understood only in the light of the board's higher authority to make policy. Suppose, for example, a board determined that all children who were not reading at grade level were to be retained—or, on the contrary, that all children were to be promoted after a given period spent in a grade, regardless of progress. A principal might strongly disagree, but he would have no choice but to carry out the policy. When a board sets policy in these and other areas, the principal is obliged to carry it out. As one commentator put it, "[The principal] clearly has the power to enact rules and regulations for the proper conduct of the school in his charge as long as his actions do not conflict with the superintendent's responsibility for implementing board policies."[6]

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[1] The right of the states to legislate in the area of education is not exclusive. The federal government also occupies the field by means of its power to tax and spend for the general welfare (U.S. CONST. art. I, § 8, cl. 1), upheld by the United States Supreme Court in United States v. Butler, 297 U.S. 1 (1936).

[2] N.C. CONST. art. IX, §§ 1-5.

[3] N.C. GEN. STAT. §§ 115-27, -35 (1978).

His Own Employment Rights

Principals' Tenure. Most persons appointed as principals will already have gained tenure or career status as teachers under the state tenure statute, G.S. 115-142. As principals[7] they may also acquire what we will hereafter call administrative tenure. They do so by serving three consecutive years as a principal of a particular school.[8] Those few principals who were not yet tenured as teachers when they were appointed must first achieve teacher tenure and then serve an additional three-year period for administrative tenure.

What does administrative tenure mean for a principal? To answer that, one looks to the North Carolina tenure law and court interpretations of it and to federal court interpretations of tenure and school employees' constitutional rights. Even then, many portions of the question cannot be answered definitely. For instance, the statute tells us explicitly that a tenured principal cannot be paid less than his current principal's salary unless he loses tenure through dismissal or otherwise.[9] But can he be relieved of his principalship and reassigned to another administrative position or even to the classroom if the board is willing to continue to pay him his present principal's salary? I believe the answer is "yes," but respectable legal arguments can be made both ways. Let's examine them. First, for the principal's side, the statute includes principals within the definition of "teacher" and states that teachers with tenure cannot be demoted. Surely, returning a principal to the classroom and perhaps transferring a high school principal to an elementary school is a demotion in the ordinary sense of the word—and is therefore prohibited. But the statute's definition of "demote" weakens the argument for the principal somewhat. It says, in part: "'Demote' means to reduce the compensation of a person who is classified or paid by the State Board of Education as a classroom teacher [this includes principals] or to transfer him to a new position carrying a lower salary."[10] The emphasis seems to be on what the person is paid. Still, a principal who wanted to retain a principal's job could argue that he has a right to the status as well as the pay and therefore the definition prevents his being transferred to a position that normally carries a lower salary, even if in his case it carried the higher salary of a principal.

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[4] *Id.* § 115-8 (1978).

[5] *Id.* § 115-150 (1978).

[6] Irving C. Evers, "The Principal's Authority over Assigned Personnel," in Ralph D. Stern (ed.), *The School Principal and the Law* (Topeka: National Organization for Legal Problems in Education, 1978), p. 4.

[7] North Carolina is one of only sixteen states plus the District of Columbia that grant administrative tenure. Ivan B. Gluckman, "Legal Aspects of the Principal's Employment," in Ralph D. Stern (ed.), *The School Principal and the Law* (Topeka: National Organization for Legal Problems in Education, 1978), p. 3.

[8] The North Carolina Attorney General's staff does not agree that a principal must serve at the same school for three consecutive years to gain administrative tenure. Its opinion is that a tenured person employed as an elementary, junior high, or high school principal acquires principal's tenure at the end of three years' service as a principal at that level—even if he spent two years at one elementary school and the third at another, for instance. N.C.A.G. Letter to Ms. Audrey Wagoner, Personnel Analyst, Department of Public Instruction, May 9, 1980.

The attorney for a board of education that wished to transfer a principal with administrative tenure to some other position might well argue the following: The definition of "demote" states only that the principal's pay must remain the same; other language in the statute [G.S. 115-142(d)2] reinforces the salary point, thereby implying that principals need not be kept in administrative positions under all circumstances; well-accepted principles of contract and labor law indicate that employees have no right to insist on performing a particular job—merely a right to the salary promised them for the job; and finally, the inherent power of the school board to administer the system should not be curtailed except by clear statutory language to that effect.

No one can know which set of arguments a court that was interpreting G.S. 115-142 at a principal's request would accept—and there are other unresolved questions. When a principal moves to another principalship within the system, does he lose administrative tenure? Should that answer depend on whether he asked for the change or was transferred involuntarily, on whether the transfer could be construed as a promotion, on the pay for the new and old positions? The question arises because some boards favor a regular rotation system for their administrators—and even if the board does not, many principals want a new challenge from time to time.

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[9] N.C. GEN. STAT. § 115-142(d)(2) (1978).

[10] *Id.* § 115-142(a)(5) (1978).

Although some questions of demotion and loss of tenure are unsettled, other points about the principal's entitlement are reasonably clear. As noted above, an administratively tenured principal is entitled to his salary. Certainly, too, he can be dismissed for the reasons and according to the procedures set out in the tenure statute (discussed below), and some legal authority suggests that a board may have slightly more leeway in dismissing a principal than in dismissing a teacher. In noting that teachers now have a certain latitude to engage in personal conduct that board members may consider immoral, one author states: "It would appear, however, that even under the more permissive morality standard, principals are more subject to termination for cause than are teachers because leadership and community respect are of such great importance to the principal's position."[11] In other words, courts may be more willing to recognize a sphere of privacy for teachers than for principals because a principal, more than any single teacher, is justly expected to represent the school system in the public's eyes and to serve as a model for students and school employees.

A similar point can be made about a principal's need to get along with others in the system. Public employees, including teachers and principals, have a right to free speech protected by the First Amendment to the United States Constitution. The United States Supreme Court has held, for instance, that a teacher cannot be dismissed for public criticism (in a letter to a newspaper) of the school board's and superintendent's actions. But the Court strongly implied that administrators, as opposed to teachers, might be required to behave differently under the circumstances. The Court noted that "significantly different considerations" would prevail if the employee's job had involved 'the kind of close working relationships [between critic and those criticized] for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."[12] Courts may tend in future cases to view principals as part of a management team and may feel that the school administration is justified in believing that public criticism from a team member lessens his effectiveness.

Tenure Status in General. Even if the employment rights of teachers and principals differ in some slight degree, it will be useful to principals to summarize here the provisions of the tenure statute. Principals need to be familiar with its provisions both because it governs their administrative tenure and because, unless they are dismissed for cause, those who lose administrative tenure still have tenure as teachers. Tenured employees have continuing contracts, which the board may terminate only for serious defects that fall into these general categories: incompetence, immorality, insubordination, neglect of duty, physical or mental incapacity, drug abuse, potential or actual loss of certification, advocating the violent overthrow of the government, failure to pay debts to the state or conviction of a felony or crime involving moral turpitude. Cutbacks required by program changes and financial needs are also sufficient reasons for dismissing or demoting tenured personnel.[13]

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[11] Gluckman, "Legal Aspects of the Principal's Employment," p. 5.

[12] Pickering v. Board of Education of Township High School Dist. 205, 391 U.S. 563, 570 (1968).

The procedure for dismissing or demoting tenured employees is elaborate. First, the superintendent notifies the employee by certified mail that he intends to recommend dismissal to the board and specifies the grounds. If the employee acts within fifteen days after he receives the notice, he may contest the superintendent's recommendation by asking for review by either of two bodies—a group known as a professional review committee[14] or the board itself. If he goes directly to the board, the employee waives his right to an investigation by the professional review committee. But no matter what the outcome of a committee hearing, the employee still has a right to a board hearing.

The board enters the process when it receives a written recommendation of dismissal from the superintendent. If the employee requests a board hearing, it must be held within ten days. If there has been a professional review committee investigation, the board will also receive a copy of that committee's report. In the latter case, within seven days after it receives the recommendation and the report and before it takes action, the board notifies the employee by certified mail that it has received these items. The notice sets a hearing date, naming a specific time and place between seven and twenty days after the date on which the employee should receive the notice, and states that the employee will forfeit the right to the hearing if he fails to send the board written notice of his intention to be heard postmarked no later than five days after he received the board's communication. The board's letter must state also that if the hearing is waived or forfeited, the board may dismiss the employee.

By statute, the hearing must be private. While this requirement is primarily for the employee's benefit, it may not be waived without the board's consent by an employee who would prefer a public hearing.[15] Also by statute, the employee and the superintendent, as the opposing parties, may be present, speak, be represented by counsel, and present evidence and witnesses. If the board has rules for dismissal hearings, they are controlling. If not, the board must follow State Board regulations.[16] The regulations provide these rights for both the employee and the superintendent:

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[13] N.C. GEN. STAT. § 115-142(e)(1) (1979 Supplement). For a full discussion of reduction in force, see the series of four articles by Robert E. Phay beginning with "Reduction in Force: Retrenchment in the 1980s," *School Law Bulletin* 11, no. 2 (April 1980) (Institute of Government).

[14] N.C. GEN. STAT. §§ 115-142(g), -142(i) (1978).

[15] Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567 (4th Cir. 1975).

[16] N.C. GEN. STAT. § 115-142(j)(2) (1978).

(1) The right to be represented by counsel;
(2) The right to present all relevant evidence by means of witnesses, books, papers, and documents;
(3) The right to examine all opposing witnesses on any matter relevant to issues contested in the hearing;
(4) The right to have subpoenas issued for witnesses, books, papers, or documents.

The State Board regulations give the board these rights:

(1) To have counsel to develop the case;
(2) To subpoena witnesses and relevant books, papers, and documents;
(3) To administer oaths or affirmations to witnesses called to testify;
(4) To take testimony;
(5) To examine witnesses;
(6) To punish for contempt for any disorderly conduct or disturbance tending to disrupt the hearing;
(7) To adjourn the case, if it cannot be completed in one session.

Although the board is performing a judicial function, it is not bound by the rules of evidence that would be observed in a court. It may rely on any evidence so long as it is "of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs." But it is required to make a complete record of evidence received at the hearing and, if it decides to dismiss the employee, to provide a free transcript to him if he appeals to superior court.[17]

If there has been a professional review committee investigation, the board will consider the committee's report and any minority report at the hearing, together with the superintendent's original recommendation and evidence presented by the parties at the hearing. The committee's report is not binding on the board. It is competent evidence—that is, the board must consider it—but it may be contradicted by the evidence of the superintendent and of sworn witnesses presented at the hearing.

The employee, his counsel, and the board's counsel all have the right to cross-examine witnesses. (This right is also included in the State Board's hearing procedures to be used when there are no locally adopted procedures.) At the request of either party, the board must issue subpoenas requiring persons to appear as witnesses or to produce evidence. The board must pay witness fees for as many as five persons who live outside the county, are not board employees, and are subpoenaed at the employee's request. Although no witness fee is paid to other employees of the board, the law provides that they may not suffer any loss of compensation. Following the hearing, the board reaches a decision based on the evidence presented at the hearing and sends a written copy of its finding and verdict to the parties within five days after the hearing. An employee who is dismissed has a thirty-day period after he is notified of the decision in which to appeal to the superior court in the county where he is employed.[18]

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[17] 16 N.C. ADMIN. CODE § 2F .0103(5) (1977).

A board may choose less drastic action than dismissal or demotion temporarily. It may suspend any employee, even a tenured one, for a brief time. The law allows suspension without pay and without advance notice or a hearing when the board believes an emergency exists along with any statutory ground for dismissal except incompetence.

When the problem is one of incompetence—that is, job performance so inadequate that the board considers it an emergency—the employee must have notice and a hearing before he is suspended. First, the board gives written notice of its intention to suspend and its reasons and sets a date for the suspension hearing that falls between two and five days after the employee will have received notice. The procedure for this hearing is the same as for a dismissal hearing.[19] After the hearing the board may by resolution suspend the employee without pay.

If an employee is suspended, the superintendent must either begin dismissal proceedings during the five days following the suspension or reinstate him with back pay. If eventually no grounds are found for dismissal, the employee is entitled to reinstatement with back pay for the suspension period.[20]

Probationary Status. What protection does a principal have before he is tenured? If he was a tenured teacher at the time he became a principal, he retains teacher tenure while working toward administrative tenure. Although this point is not spelled out in G.S. 115-142 and has not been raised in court, it is generally conceded by persons familiar with the statute to be the intent and effect of the law. In addition, while working toward administrative tenure, a principal has the rights of a probationary employee in regard to the principal's position. The board may decline to renew his principal's contract for many reasons, but it may not act from personal or political motives or for a reason that is arbitrary, capricious, or discriminatory.[21] He must have thirty days' notice that his contract will not be renewed, not counting Saturday, Sunday, and legal holidays.[22] Finally, there is even greater protection against dismissal or reduction in salary during the contract period (July 1 to June 30). During that period, the board must treat the principal as if he were administratively tenured.

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[18] N.C. GEN. STAT. §§ 115-142(i), -142(l), -142(n) (1978).

[19] *Id.* § 115-142(j) (1978).

[20] *Id.* § 115-142(f) (1978).

[21] *Id.* § 115-142(m)2.

[22] *Id.* § 115-142(o). One lower court in North Carolina actually ordered tenure granted to an employee in the final year of the probationary period who did not receive proper notice. The teacher received more than 30 days' actual notice, but the period amounted to less than 30 days when weekends and legal holidays were excluded. Coplan v. Orange County Bd. of Educ., 77 CvS. 442, N.C. Super. Ct. (Aug. 30, 1977).

Chapter 2

RESPONSIBILITY FOR STUDENT WELFARE

English and American law recognized early that schools perform some of the functions of parents. Blackstone's *Commentaries* (1765) stated the fact explicitly in respect to discipline, enunciating a legal concept that remains valid today, though it is weakening.[1] An implied corollary of the discipline concept—that schools have as strong a duty to protect children as parents do—retains its original strength.[2] The schools' concern for student welfare takes various forms: enforcing the compulsory attendance law, identifying neglect or abuse by parents or guardians, guarding children's health and safety at school, regulating access to their records, and placing them appropriately in educational programs that will, at a minimum, not harm their prospects for development. These duties exist toward students in general, while at the same time any one student may have particular circumstances that require special consideration. For example, he may be emancipated—that is, freed from parental control—by marriage or age[3] or have a handicapping mental or physical condition. An especially difficult situation arises for the school when parents are at odds with each other and make conflicting demands about the treatment of their child.

Compulsory Attendance

The Constitution of North Carolina requires school attendance by "every child of appropriate age and of sufficient mental and physical ability."[4] The General Assembly sets the period of compulsory attendance between seven and sixteen years of age.[5] In other words, although children may be entered in kindergarten when they are four[6] and may stay in high school until they are twenty-one or over,[7] they are legally required to be in school only between the ages of seven and sixteen. Parents or guardians who violate the compulsory attendance law commit a misdemeanor for which they may be fined and imprisoned.[8] Failure to send a child to school is also sufficient grounds for a court to find that he is "neglected," although he is well cared for in every other way.[9]

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[1] Blackstone, the eighteenth-century collector of and commentator on English law, says that the parent may "delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis [in the place of the parent], and has such a portion of the power of the parent committed to his charge, viz.: that of restraint and correction, as may be necessary to answer the purposes for which he is employed." *Commentaries*, Book I, 453.

[2] It is true that in the last fifteen years higher education has given up most social regulation of its students, but this is due more to a change in the perception of when young people become adults than to abandonment of the concept that children should be protected.

[3] Emancipation means achievement of adult status with its attendant legal consequences. It allows a high school student to establish his own residence for attendance purposes, and probably emancipated minors cannot be required to obtain parental consents, have report cards signed, etc. However, reasonable school rules may be applied to all students regardless of age. See *A Legal Memorandum* (Reston, Va.: National Association of Secondary School Principals, January 1974).

[4] N.C. CONST. art. IX, § 3. But N.C. GEN. STAT. § 7A-648(3) allows judges to excuse from attendance children who have been adjudicated delinquent or undisciplined.

A large share of the responsibility for enforcing compulsory attendance falls on the principal. He supervises teachers in taking daily attendance, determines the reasons for absences, and reports children who appear to be absent without good cause to the attendance counselor.[10] When a child is absent for five consecutive days without good excuse or accumulates ten unexcused absences, the principal must write to the parents or guardian informing them of the absences and the fact that they are subject to prosecution for not sending the child to school. If a child accumulates thirty unexcused absences, the principal must notify the district attorney.[11]

The State Board of Education[12] and, occasionally, the local board have established guidelines for the principal to follow in excusing absence. The State Board rules list these as acceptable reasons for absence:

(1) Illness or injury.
(2) Quarantine ordered by the local health officer or State Board of Health.
(3) Death in the child's immediate family.
(4) Medical or dental appointments. Except in emergencies, a school official's permission must be secured beforehand.
(5) Participation in court or administrative proceedings as a party or subpoenaed witness.
(6) Religious observances. The local board determines whether to excuse these absences, but the State Board urges approval "unless the religious observance, or the cumulative effect of religious observances, is of such duration as to interfere with the education of the child."
(7) Immediate demands of the farm and home. This excuse requires that

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[5] N.C. Gen. Stat. § 115-166 (1979 Supp.).

[6] *Id.* § 115-205.12 (1978).

[7] *Id.* § 115-163 (1978).

[8] *Id.* § 115-169 (1978).

[9] *In re* McMillan, 30 N.C. App. 235 (1976).

[10] N.C. Gen. Stat. §§ 115-146, -170 (1978).

[11] *Id.* § 115-166 (1979 Supp.).

[12] N.C. Gen. Stat. § 115-167 (1978) gives the State Board the right to define lawful absences. The Board promulgated regulations on the subject, effective September 18, 1979, to be codified as 16 N.C.A.C. 2D.0400.

the child be needed to perform farm or home work and that other persons be unavailable to take his place.

(8) Educational opportunity, such as travel. A school official must give permission in advance.

Disciplinary suspensions or expulsions are not excused absences.

The State Board rules and the General Statutes[13] state that local boards may enforce compulsory attendance more strictly than these grounds for nonattendance suggest; presumably the local board could refuse to accept some of the excuses listed above. But a local board probably may not be more lenient than the State Board in excusing absences. A local board policy that required junior and senior high students to attend 80 per cent of classes in a course to gain credit (no distinction between excused and unexcused absence) was disapproved by the Attorney General's staff as a violation of the compulsory attendance law. In the staff attorney's opinion, no school official can waive attendance except for valid reasons; thus any rule giving a certain number of "free cuts" is impermissible.[14]

Notice to parents and the threat of prosecution are not the only methods used to influence attendance. State Board rules specifically allow teachers to take absences into account in figuring grades. Still, that policy should be used cautiously. An Attorney General's letter says:

> Since 1964 it has been the opinion of this office that a local board of education may properly establish academic penalties such as grade reductions for the failure of a child to attend class. Class attendance and the resulting exposure to instruction is clearly a part of the learning experience and process for all children and we believe it may be accounted for in the computation of a child's grade, just as class participation, completion of homework assignments, test grades and other academic factors are considered.
>
> Of course, such policy should be reasonable (not arbitrary and capricious or unduly harsh) in order to avoid any claim of denial of due process and applied in an evenhanded manner to avoid any equal protection claim. [Citations omitted.] The most likely claim against any such policy would be that it is so harsh as to violate substantive due process. In this regard we point out that while we believe there is a clear relationship between a certain level of class attendance and learning, no such connection exists between a few absences and the overall level of academic achievement in the course.[15]

The letter goes on to say that while such penalties, if they are applied at all, could and probably should be applied for all absences, even excused ones, grades should never be reduced for misconduct that does not result in absence.[16] It should be remembered, however, that no court in North Carolina has yet ruled on whether grades may be reduced for absence; and of the very few courts in other states that have considered the question, half hold or at least suggest that grades may not be reduced.[17] See the section entitled Lowering Grades in Chapter 3.

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[13] N.C. Gen. Stat. § 115-167 (1978).

[14] Letter to Mr. James L. Newsom, Attorney for the Durham County Board of Education, August 17, 1979.

[15] *Id.*

Reporting Abuse and Neglect

North Carolina law forbids abuse or neglect of children[18] and requires any person (or institution) who suspects mistreatment to report his suspicions to the county director of social services.[19] School officials, especially principals, are in an excellent position to observe the signs of physical or emotional harm being done to children by their parents, guardians, or even teachers (see the section on corporal punishment in Chapter 3). In 1979 the General Assembly broadened the reporting duty to include all persons, but even before then school officials and other professionals in contact with children were required to report. They still have a greater moral and (it can be argued) legal responsibility than ordinary persons because of their greater opportunity to observe and their special relationship to children.

School personnel must report suspected abuse or neglect of any student under eighteen. As noted above, the duty to report now falls on all persons. Thus any school employee, like any citizen who suspects child abuse or neglect, bears a legal obligation to report his suspicions. As a matter of good administrative policy, the principal would be wise to ask that any employee who does make a report inform him of the fact.

A hard question for the principal (if the school board has not decided the issue) is whether to keep a written record of abuse and neglect reports made by school employees about students. There are two reasons to do so. First, the records are a protection for the student. If, for instance, more than one report were made about a child over a period of time, the principal's records would alert him to the possibility of a dangerous situation. Second, they protect school officials against potential liability. If necessary, records would be evidence that the school authorities discharged their legal responsibility to report (the statutory duty) and to guard the child (the general common law duty).

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[16] *Id.*

[17] Dorsey v. Bale, 521 S.W.2d 76 (Ky. App. 1975); Gutierrez v. Otero County School District, 585 P.2d 935 (Colo. App. 1978); Hamer v. Board of Education, 66 Ill. App. 3d 7, 383 N.E.2d 231 (1978). Moreover, the New Jersey Commissioner of Education, who has quasi-judicial powers, has ruled several times that grades may not be reduced for absenteeism.

[18] N.C. GEN. STAT. § 14-318.4 (1979 Supp.) makes severe forms of child abuse a felony. N.C. GEN. STAT. § 14-318.2 (1979 Supp.) makes it a misdemeanor for a parent or caretaker to (a) inflict physical injury, (b) allow physical injury to be inflicted, or (c) create or allow to be created a substantial risk of physical injury by other than accidental means.

[19] N.C. GEN. STAT. § 7A-543 (1979 Supp.).

But written records do present a difficulty. Under the Family Educational Rights and Privacy Act (Buckley Amendment),[20] parents have a right to be told of the existence of every kind of record kept by the school on their child. Once parents are aware that a record of abuse-reporting is kept, they have the right to see any portions of the record pertaining to their child. If the principal's record includes the name of the person who made a report to the social services department, the federal law requires that the parent be given the name if he asks for it. The possibility of embarrassment, or even threats or violence, to employees who report might discourage them from reporting. The best compromise may be for the principal to keep the briefest record possible—one that does not even name the reporter but merely notes that a report was made to the director of social services on a particular date about a named child and gives the eventual disposition of the complaint.

The statutory definition of abuse is broad.[21] It includes inflicting serious physical injury on a child, allowing another to do so, or creating or allowing a substantial risk that deliberate, serious, physical injury will occur. It also includes illegal sexual acts with a child and encouraging or approving certain delinquent acts on his part. Finally, it includes serious emotional damage. To fit the definition of abuse, the emotional damage must be accompanied by the parent's refusal to allow treatment. The statute notes that emotional damage may be occurring when a child shows "severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others."

Neglect is defined as failing to provide proper care, supervision, or discipline; abandoning a child or placing him for care or adoption in violation of law; failing to provide necessary medical or other remedial care; or allowing the child to live in an environment injurious to his welfare.[22]

The procedure for reporting abuse or neglect is as follows (G.S. Ch. 7A, Art. 44). The person who makes the report should contact the director of social services in the county where the child lives—in person, by telephone, or in writing. He should give his own name, address, and telephone number; the name, address, and telephone number of the child and his parent, if known; and the child's age. He should then describe the injury or condition that creates concern and give any other information he thinks might be helpful to the director's investigation. The director then investigates the report, perhaps with the help of law enforcement authorities. If he finds it necessary, he takes action to protect the child. In any case, he notifies the person who reported, in writing, either that he found no abuse or neglect or that the department is acting to protect the child, describing the action. If the reporter is dissatisfied with the director's findings, he has five days after he receives those findings within which to ask the district attorney to review the matter.

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[20] 20 U.S.C. § 1232g (1976).

[21] N.C. Gen. Stat. § 7A-517(1) (1979 Supp.).

[22] *Id.* § 7A-517(21) (1979 Supp.).

As a protection for persons who report, the law provides that the department of social services must keep the information it receives in strictest confidence.[23] (This does not, however, entirely eliminate the possibility that a reporter will be required to testify in a court proceeding.) Moreover, any reporter who acts in good faith is immune from civil or criminal liability arising from the incident.[24]

Students' Health

State statutes reveal the General Assembly's desire to have school personnel take an interest in students' health. G.S. 115-143 is concerned with contagion. It provides that every person who works in a school system must have a current physician's certificate on file in the superintendent's office. When a person is first employed or re-employed after more than a year's absence, a certificate that he "does not have tuberculosis in the communicable form, or other communicable disease, or any disease, physical or mental, which would impair the ability of the said person to perform effectively his or her duties" must be filed before he may begin work. Thereafter he must file a certificate of freedom from communicable tuberculosis at the beginning of each year before starting work. In addition, the school board or the superintendent can require an employee to undergo a physical examination at any time, and anyone absent more than 40 days in a row because of a communicable disease must submit a doctor's certificate that he is free from communicable disease before returning.

Another statute (G.S. 115-133) requires principals, teachers, and janitors to report unsanitary conditions to the board of education, and principals are authorized by G.S. 115-183(2) to use a school bus to take a student (or employee) to the doctor or hospital in case of an illness or injury that requires immediate attention.

Health instruction is one of the few statutorily required parts of the curriculum. G.S. 115-204 calls for health education, which must include instruction on the harmful effects of alcohol and other drugs, and requires that teachers observe their pupils and report obvious abnormalities. Under Department of Public Instruction regulations, this term includes abnormalities in height and weight as well as problems of sight and hearing. The statute also encourages the State Board of Education and the Department of Human Resources (DHR) to spend state health funds, when available, on free dental treatment and the correction of sight, hearing, or other physical defects for children of indigent parents.

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[23] *Id.* § 7A-544 (1979 Supp.).
[24] *Id.* § 7A-550 (1979 Supp.).

Enforcement of the immunization law (G.S. 130-87 through -93.01) is a major health responsibility of schools. The statute (G.S. 130-90) requires the principal to cooperate with the DHR's enforcement program by refusing to allow a child not properly immunized to remain in school longer than the thirtieth day after he enters. The law, rewritten in 1979 and strengthened in numerous respects, requires that the principal determine whether all children enrolled are in compliance and exclude those who are not. (Some school authorities had argued that the former statute required them to check for immunizations only when a child first entered school.) Children who received red measles vaccinations before their first birthday must be revaccinated against the disease. Local health departments must provide all immunizations free. Schools must keep records of immunizations, which are to be open to inspection by state and local health officials, and must report in writing to DHR within 60 days after school opens. The report must give the total attendance, the number of children not immunized, and the number exempted from immunization. (Day-care facilities have identical duties, which should ease the burden for schools.) There are two exemptions from the immunization requirements: one for children who should not be immunized for medical reasons, another for those whose parents object on religious grounds. Parents of the latter group must file a written statement[25] that vaccination violates their religious convictions.

In 1979 the General Assembly also redefined teachers' duties to include a health-service role, and it attempted to provide them some protection from liability arising from that part of their duties. According to G.S. 115-146.1, teachers' duties may include (1) giving medication, if a parent requests it in writing; (2) performing first aid or lifesaving techniques learned in a training program approved by the State Board of Education; and (3) giving emergency health care when delay would seriously endanger the student's life or health. No teacher can be required to do the first two, but the third is already the duty of every teacher or principal. The law of torts (see pages 16-19) recognizes that teachers and principals have a duty of care toward students that includes taking the reasonable steps any ordinary adult should be capable of during an emergency.[26] G.S. 143-300.14 provides that the state may defend teachers or other school employees against claims that arise from their rendering of health care, and it may pay judgments (G.S. 143-300.16) under the State Tort Claims Act. To qualify for this assistance from the state, however, the teacher or employee must notify the Attorney General within 30 days of being notified of the claim or 10 days after being served with a complaint. It should be emphasized that the state is not *obliged* to provide this defense or to pay a judgment. The Attorney General may refuse to defend, settle, or pay judgments under a number of circumstances, including a broad exemption for actions in which defense "would not be in the best interests of the State."[27]

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[25] The statute does not say where or with whom the statement should be filed, but the principal would be a logical recipient. He should at least receive a copy.

[26] W. Prosser, *Law of Torts*, 3d ed. (St. Paul, Minn.: West Publishing Co., 1964), § 54, p. 338.

Student Safety

Certain North Carolina statutes give principals specific obligations for student safety. G.S. 115-133 requires them to report any needed repair of buildings to the board of education. (The same obligation also rests on teachers, janitors, and district committeemen.) Four related statutes (G.S. 115-150 through -150.3) assign numerous fire prevention duties to the principal (see Chapter 6) and punish his neglect of them as a misdemeanor.[28] G.S. 115-258 and -259 provide that school boards must procure devices to protect the eyes and require them to be worn by teachers, students, and visitors in potentially dangerous laboratory courses. Though principals are not mentioned in the eye-safety statutes, it may be assumed that they will be the ones who will supervise the implementation of these provisions. Article 22 of G.S. Ch. 115, which deals with school buses, places responsibility for a safe transportation system primarily on principals. See Chapter 7 for a discussion of that subject.

But statutory law is only a small part of a principal's obligation to keep the school safe for students. The larger obligation arises not from statutes but from the common law of torts. Tort law governs civil (as opposed to criminal) injuries. Black's *Law Dictionary* defines tort as "a violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction." For a tort to occur, there must be a duty owed by one person to another, a breach of that duty, and a reasonably foreseeable resulting injury or damage. Moreover, the duty must be one imposed by law, not merely by private agreement or contract between persons or by a religious or moral impulse.

Do teachers and principals have a legal duty to their students? Definitely yes. Their duty to guard students from physical injury is well recognized in the law of torts.[29] It is generally agreed that school personnel to whose care children are entrusted must protect them from harm just as a parent must do.[30] The principle is a natural and logical corollary of the in loco parentis concept that allows schools to discipline students as their parents might. Naturally, the nature and extent of the duty varies with the age, experience, and mental and physical ability of the child. Schools must be far more protective of first-graders than of twelfth-graders, more protective of the mentally and physically handicapped than of children who are not handicapped.

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[27] N.C. GEN. STAT. § 143-300.15 (1979 Supp.) allows the Attorney General to refuse to defend for reasons listed in N.C. GEN. STAT. § 143-300.4(a) (1978). Those are (1) when the claim did not arise out of the state employment; (2) when the employee acted from fraud, corruption, or malice; (3) when defense would create a conflict of interest between the state and the employee; and (4) when defense would not be in the state's best interests. N.C. GEN. STAT. § 143-300.16 (1979 Supp.) assumes that judgments will be paid only for claims that were defended or could have been defended by the Attorney General.

[28] Every principal should keep a copy of these statutes to refer to in carrying out their requirements. The laws' directions as to drills, removal of hazards, and inspections are detailed.

[29] Prosser, *Law of Torts*, pp. 337-38.

But to some degree the duty exists toward every student. In finding that a bus driver had been negligent toward a child whom he struck and killed, the North Carolina Supreme Court noted: "He must recognize that children have less capacity to shun danger than adults; are more prone to act on impulse, regardless of the attendant peril; and are lacking in full appreciation of danger which would be quite apparent to a mature person."[31] In a later case on similar facts, the State Court of Appeals pointed out the variability of the duty of care: "What constitutes a place of safety [for letting children off a bus] depends on the age, experience and ability of the passenger. A place of safety for an eighteen-year-old high school senior of ordinary experience and intelligence might be a place of peril for an inexperienced six-year-old first-grader. The care which a school bus driver must exercise toward a school bus passenger is proportionate to the degree of danger inherent in the passenger's youth and inexperience."[32]

The first of the four requirements for a tort—the existence of a duty relationship—is a matter of law. The second and third elements—whether a breach of the duty occurred and whether injury resulted—are questions of fact to be decided by judge or jury. The final element is whether the injury was a reasonably foreseeable consequence of the negligent behavior, and that again is a matter of law. The law requires persons to foresee not only the obvious, immediate results of their actions but also events slightly farther removed in the chain of causation. An example from North Carolina case law[33] illustrates the point. In 1972 a collision between a school bus and an automobile caused the death of a fourteen-year-old boy who was thrown from the bus. Evidence at trial showed that the motorist caused the collision by entering the intersection from a side street, ignoring a stop sign and a flashing red light. The evidence also showed, however, that the bus driver was driving with the door open when the accident occurred and the boy had been standing in or very near the open door through which he fell to his death. (Further evidence was presented, though denied by the driver, that the driver actually instructed the boy to stand by the door and lean out from time to time to check on a loose panel on the side of the bus.) The driver argued that even if he were negligent in allowing a passenger to stand near an open door, his negligence was not the proximate (immediate) cause of the boy's death. The death, after all, was caused by the collision for which the bus driver was not to blame.

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[30] L. Peterson, R. Rossmiller, and M. Volz, *The Law and Public School Operation*, 2d ed. (Harper and Row: New York, 1978), pp. 274-76.

[31] Greene v. Mitchell County Board of Education, 237 N.C. 336, 340, 75 S.E.2d 129 (1953).

[32] Slade v. New Hanover Board of Education, 10 N.C. App. 287, 295, 178 S.E.2d 316 (1971).

[33] Childs v. Dowdy, 14 N.C. App. 535, 188 S.E.2d 641 (1972).

Both the trial court and the appellate court disagreed with the driver. The Court of Appeals' ruling is a good analysis of foreseeability:

> While having the door open had nothing to do with the collision, the evidence permits an inference that Gary's death would not have occurred if he had not been exposed to the open door, or if [the motorist] had not operated her automobile into the intersection without stopping or yielding the right-of-way. Both of these events could be found to have concurred to produce the tragic result.
>
> To be actionable it is not necessary that injury in the precise form in which it occurs should be foreseen from an act of negligence. It is only necessary that in the exercise of reasonable care, consequences of a generally injurious nature might be expected. The question here is not whether the bus driver, in the exercise of reasonable care, should have foreseen that a motorist was likely to enter the intersection from a servient street, collide with the bus, and thereby cause Gary to fall or be thrown through the open door. The question is whether the driver should have expected consequences of a generally injurious nature to result from operating the bus with the door open, while permitting (or perhaps even instructing) the youthful passenger to stand near or in the opening. We have no difficulty in answering this latter question in the affirmative.

Since the court concluded that the driver should have foreseen injury of some kind as a likely result of his negligence, it found him liable, along with the motorist, for the boy's death.[34] Thus one question for any court that hears a tort claim will be whether the defendant's behavior was reasonably likely to produce some injury, even if the specific harm produced was not exactly foreseen or directly caused by his behavior. If the answer is "yes," the legal requirement of foreseeability is met.

Even when all elements of a tort are present, the person accused will not be liable if the injured person was also negligent. The legal term for the injured person's culpability is contributory negligence. The law recognizes that children are less responsible for themselves than adults, and it reflects that fact in the rules of contributory negligence. In North Carolina, a child beneath the age of seven is held to be incapable of contributory negligence.[35] A child between seven and fourteen is presumed not to be negligent,[36] but the defendant is free to try to prove that the child *was* negligent, despite the presumption. To do so, the defendant must show that the child acted in a way he knew or should have known was dangerous. A child is not expected to act as an adult would act, but he is expected to act as an ordinary child of his same age, capacity, judgment, knowledge, and experience would have done in the same or a similar situation. Whether he did behave in this way is for the jury to decide. A child of fourteen or above is presumed to be capable of contributory negligence, as an adult is, but his attorneys are allowed to show that he was not in fact as aware of risk in the situation as an adult would have been. If the jury is convinced that the injured child acted as, say, a reasonable fifteen-year-old would have acted, he will not be held contributorily negligent.

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[34] *Id.* at 539. The case was sent back (remanded) for a new trial on the issue of whether the student was contributorily negligent. A discussion of contributory negligence follows immediately in the text.

[35] 9 N.C. INDEX 3d, NEGLIGENCE § 18, p. 387 (1977).

The point for principals to remember is that, while students can be held responsible for their own safety to a certain extent, their responsibility is only partial. Principals must be aware of the physical conditions of their school's buildings and grounds and must do what they can to keep them safe. Furthermore, they are responsible for providing adequate supervision for every child while he is under the school's care.[37] The following ten suggestions, taken from a principal's legal treatise, are excellent guidelines.[38]

1. An assembly or other meeting of both students and staff should be held periodically in order to review school rules for the safety of students.
2. When issuing instructions or directions for the safety of students in school, the age and ability of the students must be taken into account. If there are any special categories of students for whom different standards would apply, such as physically or mentally handicapped youngsters, special rules may be necessary.
3. There should be no time during the day when each student is not under the supervision of a member of the staff or otherwise strictly accounted for.
4. If your state requires that a certified person always be in charge of students, appropriate assignments should be made and a record kept of each assignment. [North Carolina does not require that students be supervised only by certified personnel, but in

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[36] *Id. See also*, Mitchell v. Guilford County Board of Education, 1 N.C. App. 373, 161 S.E.2d 645 (1968).

[37] Exactly when a child is in the school's care is a matter that principals should consider carefully. The school's responsibility cannot be confined to class hours only. It probably must include the time spent in being carried by school bus to and from the pickup point, organized after-school activities, school-sponsored trips and athletic events, and a brief waiting period before and after school. But principals would be wise, in my opinion, to try to limit the school's responsibility to these times, notifying parents clearly of the limitation.

[38] Ralph D. Stern, "The Principal and Tort Liability," *The School Principal and the Law* (Topeka: National Organization on Legal Problems in Education, 1978), pp. 214-15.

assigning duties principals should consider the varying competencies of student teachers, teachers' aides, volunteers, etc.]

5. The staff should be instructed to report all dangerous conditions so that steps may be taken to correct them. All such reports should be acted upon immediately. Similarly, all injuries to students should be promptly reported and the parents immediately notified. If there are any questions as to the seriousness of the injury, prompt medical attention should be secured.
6. Appropriate warning signs should be posted in shop rooms, parking areas, and other potentially dangerous places.
7. All activities taking place away from the school site should be approved by the principal. If there are any questions concerning the activity, the principal should investigate the matter and either disapprove the activity or impose appropriate limitations. Only students whose parents have signed permission slips drafted by the principal should be permitted to participate in such activities. The slip should indicate an acknowledgment by the parents of the nature of the activity and the nature of the supervision that will be provided.
8. The principal should consult his school district's attorney as to whether private vehicles may be used to transport students to athletic and other school events.
9. The principal should designate someone to be in charge when he is not present.
10. The principal should ascertain from an attorney whether school districts in his state are required by law to pay any judgment rendered against a principal stemming from an action taken in the course and scope of his employment. If they are not, the principal should carry appropriate insurance. Such insurance may be offered through the state professional association. [Because North Carolina units are not required by law to pay judgments rendered against employees, principals should consider purchasing their own liability insurance.]

When Parents Disagree

The principal's role as guardian of the child, standing in the place of parents, can be troublesome when the parents are in conflict. A number of principals have expressed their concern to me over how they should behave when an adversarial relationship between parents spills over into the school setting. The questions they ask include: Should a student be released during or at the end of the school day to either parent or only to the parent who brought him to school? Which parent can view the student's records (discussed below) and attend school conferences? Should a noncustodial parent be allowed to eat lunch with or visit the child at school? Should an older child's wishes be taken into consideration on these matters? Does the principal run any risk of liability if a child is "snatched" or the custodial parent's rights are otherwise violated?

Because there is so little case law on the subject, I asked two specialists in family law for advice on how a principal should handle these problems. Patricia H. Marschall, a former judge and an expert in family law, replied in part:

> A practical solution would seem to be for the school officials to assume that both of the natural parents have a right to do all the things you mention: attend conferences, eat lunch with the child, pick him up after school, etc. If the custodial parent wants to prevent this, he or she should be required to file a certified copy of a decree preventing this activity. A decree which either denied visitation, gives the custodial parent the right to determine the parameters of visitation, or specifically forbids a particular activity would suffice.[39]

Susan H. Lewis both teaches and practices in the family law area. In her opinion, when parents are separated, but no court order or separation agreement exists as to custody, both parents have the same rights to visit the child at school, to see school records and all the rest, as they would if there were no separation. If a principal is having difficulties in such a situation, Professor Lewis suggests that

> . . . it might be advisable to write a letter to each parent informing that parent that as far as the school is concerned it is obligated to defer to the full parental rights of each parent, until a separation agreement is signed or a court order is entered, and that the school cannot become involved in asserting the claims of either parent against the other.

On the other hand, where there is a court order or separation agreement dealing with custody, Professor Lewis suggests that "(t)he custodial parent is in the driver's seat, unless there are specific provisions to the contrary." A principal who faces this difficulty should obtain a copy of the agreement or custody order: "If the document does not answer his question, he should resolve all questions in favor of the custodial parent. If he cannot tell, he should ask the school attorney to resolve the matter." Professor Lewis states that "(t)he key information the school needs is the identity of the custodial parent . . . ."

> Custodial parents run the show, unless the documentation contains specific rights otherwise in favor of the noncustodial parent. As to the child's wishes, they are irrelevant, unless they are incorporated in a court order.[40]

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[39] Letter from Patricia H. Marschall, professor of law, North Carolina Central University, Durham, North Carolina, April 2, 1980.

[40] Letter from Susan H. Lewis, attorney-at-law, Chapel Hill, North Carolina, May 22, 1980.

Privacy of Records

The federal Family Educational Rights and Privacy Act[41] requires schools to keep confidential the records they maintain about their students. It also requires them to show the records to students' parents and eligible students. The law was enacted in 1974, and HEW regulations under it have been in effect since 1976. Its primary effect is to give parents access to their child's school records (and to give access to the student himself when he reaches 18) while denying access to other persons without the parents' consent. There are, however, a number of exceptions to this general statement.

Coverage. The law governs access to "education records." Some kinds of documents do not fit the definition of "education records," even though it is quite broad. In general, education records include any written documents directly relating to a particular student kept by the school or a person acting for the school. This definition includes every item contained in a North Carolina student's cumulative record folder: standardized test scores, grades, teacher evaluations, health data, and disciplinary actions.

It also includes many documents not kept in cumulative record folders, but the law specifically exempts records that are made by educational personnel for their own personal use and are not available to any other person except a temporary substitute (not a successor in the position). This exemption protects, for example, the notes a teacher makes about a class for his own use, so long as he does not share them with another person. More important, it probably allows guidance counselors, school psychologists, and social workers to refuse to show parents records of what students have revealed in confidence. Whether information should be kept from parents is, of course, a difficult policy decision for school officials, one that should probably be made by the school board. If the board concludes that student welfare makes it advisable to keep students' confidences from parents, then whoever made the record may not show the record to any other person. Once he does, the record becomes an education record, which must be available to parents. Furthermore, if parents are denied access to counselors' records, the next question may be whether a psychiatrist, physician, or other professional engaged by the parents can be denied access. In such a circumstance it would be harder for a school to maintain that denial was necessary for the student's protection.

Other exemptions from the definition are records on students as employees, alumni records (those made about graduates or persons no longer in attendance), and the records of a law enforcement unit associated with the school.[42]

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[41] The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1976), also known as the Buckley Amendment.

Parent/Student Access. Exceptions aside, the right of parent/student access to records is extensive. For one thing, an eighteen-year-old student's access to his records does not end when he leaves school. He may return at any time and see the remaining records, though it is also true that schools are free to dispose of records except for those few required to be kept under state law.[43] Nor do parents' rights necessarily end when the student becomes eighteen. The school system has the authority, which should be exercised through a written board policy, to let parents see the records while the young person is still a dependent for income tax purposes. Moreover, parents do not automatically lose their rights through separation, divorce, or the award of custody to the other parent. Only when one parent is specifically denied the right to view records or stripped of all parental rights by court order can the other parent deprive him or her of rights under the Family Educational Rights and Privacy Act.[44] Finally, the rights bestowed by the act belong not only to parents and legal guardians but also to persons who are acting as parents toward the child. This simplifies the school's relationship with the substantial number of children who live with persons who have not formally adopted them. Unless the school is notified to the contrary, it is entitled to assume that the adults with whom a child lives are his "parents" for the purposes of the records act.

Parents and adult students who inquire about the student's records should first be shown a list of the kinds of records the school maintains. Then they must be shown the records they wish to see as soon as it is convenient for the school, but not more than forty-five days after the original request is received. In some instances—that is, when not unreasonable—the school may insist that parents or students come in person to view the records and may decline to furnish copies; but it must produce and mail copies of records if refusal to do so would effectively prevent access to the records by those entitled to it. A reasonable amount may be charged to cover the cost of copying, mailing, etc.

School officials sometimes ask whether they may insist on being present when records are being examined. Neither the act nor its regulations answers the question, but such a requirement is a reasonable precaution, in my opinion. The school has a legitimate interest, after all, in protecting its records as well as a responsibility to the student to do so. The presence of a school employee will often be needed, in any event, to explain the record to whoever is examining it. Parents/students are clearly entitled to explanations under the act.

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[42] These records are exempt if kept solely for law enforcement purposes, so that the law enforcement officers and school officials who are not concerned with law enforcement have no access to each other's records, 20 U.S.C. § 1232g(a)(4)(B)(ii) (1976).

[43] N.C. GEN. STAT. § 115-165.1 (1978) requires school units to keep permanently "as a minimum, adequate identification data (including date of birth), attendance data, grading and promotion data. . . ." The legislative history of the federal act, however, clearly indicates that schools may discard information as they see fit. Indeed, the act apparently meant to encourage the purging of records. The only limitation in this regard is that no record may be discarded once a specific request to see it has been received.

[44] This point has been widely misunderstood by both parents and school officials. Occasionally, a parent with custody asks the school not to show a child's records to the other parent. Under the Buckley Amendment regulations, such requests should not be honored unless the parent shows a court order divesting the other parent of parental rights. 41 *Fed. Reg.* 118 at 24671 (June 17, 1976).

Parents/students who take exception to material in a student's records have several options. If the school agrees that it is incorrect or unfair, the material may simply be removed. But if the school stands by the accuracy and fairness of the record, the parent/student has a right to a hearing. Though many elements of the hearing are left to the school officials' discretion, several are specified by regulation. They are that

(1) The hearing must be held within a reasonable time after it is requested, but only after notice to the parents of date, time, and place;
(2) It must be conducted by a school official without a direct interest in the outcome (not, for example, by a teacher who wrote a comment under dispute);
(3) It must allow the parents/student to be represented by an attorney or other person and give them a full and fair opportunity to present relevant evidence; and
(4) It must result in a written decision within a reasonable time after it is concluded.

If the decision supports the parents, the records will be changed to reflect it. Even if the decision is in the school's favor, the parents retain an important right. If they wish, they may require that their written statement setting out wherein they disagree with the record be included in the record. From then on, as long as the disputed portion of the record is kept, the parents' explanatory statement must be shown to every person who sees the record itself.

Access of Others. The general intent of the act is that the school not show private information (as distinguished from "directory information," discussed below) from student records to other persons without the consent of the student or his parents. But there are nine separate exceptions to the general rule.

(1) School employees with a legitimate educational interest may see records. The act requires school units to adopt a written policy outlining its procedures with respect to records; the policy must define "legitimate educational interest" and list (by category or position, not by name) which employees have such an interest. School units probably have considerable discretion here. One board of education might conclude, for instance, that teachers have no legitimate interest in records once their students are promoted to a higher grade. Another might reasonably reach the opposite conclusion—that

teachers can verify their own diagnosis and treatments of educational problems by following their pupils' later academic careers.

(2) Officials of a school to which a student has transferred or is going to transfer may see the records. But his parents or he should be notified that the records will be sent and be given the chance to review them beforehand.

(3) State and local government officials who are performing audits of school units may examine records needed for that purpose.

(4) If a statute (such as the child-abuse reporting law, G.S. 7A-543) requires that information be reported, the school may release it to the government officials named in the statute. Unless the release of information is required by statute, however, the school may not release it except with the parents' or student's consent or under court order. Law enforcement agents must present a subpoena in order to see student records.

(5) When a student has applied for financial aid from a college or some other source, its representatives may see his records.

(6) Educational testing organizations that are developing tests as predictive measures or are seeking methods to improve instruction may use records if students cannot be personally identified through the research by anyone other than the researchers. The information must be destroyed as soon as no longer needed for its original purpose.

(7) If information is needed in an emergency to protect the health or safety of the student or another person, it may be released. One obvious example would be information about the allergies of a child hospitalized after an accident at school.

(8) Certain high-ranking state or federal education officials have access to records.

(9) So also do accrediting agencies.

All other persons, unless they have a court order or consent from the student or his parents, are entitled only to directory information about students—and not always to that. Directory information is defined as the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the school last attended, and similar information. If the school wants to release directory information, it must first give students and parents written notice of exactly what it intends to release and then give individual students the chance to ask that information about them not be released.

Must schools provide directory information to every outsider who asks for it? In my opinion, the answer is no. The federal act, which presumably dominates the field it covers, says that directory information "may" be released.[45]

The School's Responsibilities. The act imposes several obligations on the school unit or school. First is the duty to seek the parents'/student's consent when someone asks to see a student's records. Except for the nine categories of exempted persons noted above, before showing records the school must obtain written consent stating the specific records to be released, the reasons for release, to what categories of persons they will be given, and whether the parent/student wants a copy of the released information. Once the parent/student consents, the school releases the records, informing the recipient that he in turn is bound by federal law not to disclose to others.

Second, the school must keep, in or attached to each student's file, a list of all persons (except school personnel and those with written consent) who request access to the record and their interest in seeing it. Each person who asks to see records must be added to the list, whether or not he is permitted to see them, and the list should note whether the request was granted.

Third, every school unit must adopt a written policy on access to records.[46] The policy must do the following:

(1) Tell students and parents what rights the federal act gives them;
(2) Tell them how to go about gaining access to their records;
(3) State the amount charged for copies and under what circumstances the school will not furnish copies;
(4) Name the kinds and locations of education records the school keeps and the title and address of the person responsible for each;
(5) Describe what information the school will release without consent;
(6) State that a list, which the parent/student may see, is kept of every person who asks to see the student's records;
(7) Explain the procedure for correcting a record and for inserting a statement disputing the record.

Copies of the policy must be available for any parent or student who asks for one. More important, the school must make reasonable efforts to notify parents and students of their rights each year. The penalty for a deliberate and continued violation is a cutoff of federal funds.

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Protecting Students from Themselves: Self-Incrimination, Counseling

One very difficult problem of the principalship is the need to strike a balance between protecting the individual student, on the one hand, and protecting the interests of the school community and the larger community, on the other. The problem comes sharply into focus when the principal learns or believes he is about to learn that a student has been involved in crime. To some extent, the principal must consider his actions in the light of legal principles. He has a legal duty, from the in loco parentis doctrine, to act for the student as the child's parents would act. He has the same duty, however, to act for the well-being of all other students under his care, in addition to his duties to maintain order in the school as its executive head and to cooperate with the police as a citizen. The conflict of legal obligations leaves the principal with considerable discretion, so that his choice is likely to be made as much on the basis of ethics as of law. Charles M. Wetterer, a principal and a lawyer, describes the principal's situation, when police are not involved, in these terms:

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[45] A contrary argument would be that under state law all records kept by public schools are public records, available to anyone. Certain records are specifically protected by the federal act but those that are not, such as directory information, are governed by state law, and hence open.

[46] For an excellent, comprehensive model policy, see Joan G. Brannon, "Student Records: Proposed School Board Policy to Comply with New Regulations," *School Law Bulletin* 8, no. 1 (Institute of Government, January 1977).

> It is generally accepted that legally, the principal may deal with minor criminal acts committed in his school and decide on suitable punishment for the offender.
>
> The school administrator is allowed greater latitude than the police in interrogating students in an effort to uncover wrongdoing and criminal acts because of the in loco parentis relationship of the principal to the student and because the principal has an obligation to protect the student body from crime and physical danger. However, questioning by the principal to discover where the guilt lies presupposes that the principal will handle the problem himself and will confine any punishment of the student to a school disciplinary proceeding. Whenever the principal realizes that the nature and seriousness of the crime are such that it is his duty to call in the police, he should avoid any further questioning of the suspected student. If he continues to interrogate beyond this time, he no longer acts in loco parentis, but rather as an agent of the police.

When the police become involved, either because they contacted the principal in the first place or because he called them, the situation changes. At that point, since the police are pursuing the public's interest, the principal should protect the student until his parents are available to do so. Wetterer's assessment is this:

> If the police come to school with a warrant to search a child's person or locker, or to make an arrest, the principal must comply. He could be guilty of a crime, himself, if he refused. However, it is in the best interests of the child to request permission to call his parents and inform them of what is going to occur, whether it be questioning relative to a search or an arrest.
>
> Once the police are involved in a matter of suspected student crime, the role of the principal, or other school person, is ethically, if not legally, very clear. While he may be outraged, repelled or dis-

> gusted by the alleged crime, he must act to safeguard the student's rights because of his obligation to the student.
>
> The principal's first and most important action for the child's protection is to notify the child's parents. The principal should urge the delay of questioning by the police, if at all possible, until it can be done in the student's home or, at least, in the presence of the parents. If this is not possible because the child's parents cannot be reached and the police insist that the interrogation cannot be delayed, then the principal himself should take the place of the parents. The school official must protect the student against self-incrimination. At the very least, he should advise the student of his right to remain silent if the police fail to do so. He must assure the student, and make it clear to the police, that he is there to see that the child's rights are protected. The student should not be coerced or threatened into making self-incriminatory statements or a confession.
>
> By zealously protecting the student's rights, the principal is not hampering the detection of crime or interfering with the work of the police. He is serving the cause of justice and fulfilling his legitimate obligations to the students in his charge.[47]

See "Working with Police," Chapter 3, for a discussion of North Carolina law on interrogation of juveniles.

What about students' confidences to a guidance counselor? Should they be protected? (See the Privacy of Records section on keeping counseling records from parents.) The problem is somewhat easier there because the police are not involved, but the principal has the added difficulty of not being the sole or the initial decision-maker. The counselor is the first to receive information from students, and he must decide when to share it with the principal. To avoid troublesome—perhaps dangerous—situations, principals and counselors should reach general agreement on their respective responsibilities.

The counselor's role can be difficult. Inevitably, he feels a conflict at times between his duty to the student and his duty to the school administration of which he is a part. This conflict is explicitly recognized in the American Personnel Guidance Association's ethical standards:[48]

> The member [counselor] has a responsibility both to the individual who is served and to the institution within which the service is performed. The acceptance of employment in an institution implies that the member is in substantial agreement with the general policies and principles of the institution. Therefore the professional activities of the member are also in accord with the ob-

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[47] Charles M. Wetterer, "Emergency Situations Involving Alleged Student Crime," in Ralph D. Stern (ed.), *The School Principal and the Law* (Topeka: National Organization for Legal Problems of Education, 1978), pp. 182-83.

[48] American Personnel Guidance Association, *Ethical Standards*, rev. ed. (Washington, D.C., 1974) (henceforth *APGA Standards*).

> jectives of the institution. If, despite concerted efforts, the member cannot reach agreement with the employer as to acceptable standards of conduct that allow for changes in institutional policy conducive to the positive growth and development of counselees, then terminating the affiliation should be seriously considered [Section A(2)] . . . .
>
> The counseling relationship and information resulting therefrom must be kept confidential, consistent with the obligations of the member as a professional person [Section B(2)].

The Association's standards hold [Section B(1)] that the counselor's primary obligation is to the counselee, but this need not prevent cooperation or information-sharing between the counselor and the principal. The best relationship may be one in which the counselors agree to share information on problems affecting the school without identifying particular students.

Another suggestion by Duane Brown, professor of education and coordinator of the counseling psychology program of the University of North Carolina at Chapel Hill,[49] is that counselors should distinguish between information from students about events that have already occurred and information on events that are planned. While he would rarely, if ever, divulge information about past events, Professor Brown advises a counselor who learns from a student in confidence of an impending breach of the law or school regulations to tell school or law enforcement authorities,[50] again without identifying individuals, and to tell the student that he intends to do that.

Sometimes a student confides information that reveals that he is in some danger. In this instance, too, the counselor and also the principal, once he is informed, have a duty to breach the confidence. For example, Prof. Brown recalls that his university students, while training as counselors, have been told of strong suicidal urges, of sexual molestation by school employees or family members, of failure to take life-saving medication, and of pregnancy in circumstances that seemed to threaten the mother's mental or physical health.[51] In these instances he and the counselors-in-training did not hesitate to inform proper persons immediately, as required by another of the APGA standards.[52]

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[49] I am indebted to Professor Brown for most of the material presented in this discussion of counseling. In our interview (March 19, 1980) he helped me clarify my thinking on the issue of confidentiality and provided useful examples and advice for counselors and principals.

[50] Some counselors believe that North Carolina law (G.S. 8-53.4) prohibits their revealing to anyone anything learned in the counseling relationship. This is incorrect. The statute applies only to the admissibility of evidence in civil or criminal actions.

[51] Professor Brown does not consider the fact of pregnancy alone to be a circumstance that should necessarily be revealed.

[52] "When the counselee's condition indicates that there is clear and imminent danger to the counselee or others, the member is expected to take direct personal action or to inform responsible authorities." Section B(4), *APGA Standards*.

It is important to tell students when their confidence will be breached—if possible, before confidences are given. Section B(7) of the APGA standards states that "counselees shall be informed of the conditions under which they may receive counseling assistance at or before the time when the counseling relationship is entered." Since most contacts between counselors and students do not involve confidential information, it may seem awkward to the counselor to warn all students that under some circumstances information they reveal will be passed on. Even so, the counselor should be alert to indications that a particular student is about to divulge secrets so that he can be warned.

Offering Adequate Educational Opportunity

A few children make very little academic progress. Many more do not learn as well or as rapidly as their parents think they should. When this happens, what responsibility, if any, does the principal bear? No final court decision has yet found a school employee liable for a student's failure to learn, but the issue has been litigated often enough in recent years to merit a discussion here.

The first claim from a student who asserted that he had not learned appeared in a seemingly frivolous action brought by a Columbia University undergraduate.[53] In response to the university's claim for $1,000 in overdue tuition, the student lodged a $7,000 counterclaim for fraudulent misrepresentation. Citing the university catalogue, inscriptions on campus buildings, and graduation speeches by university officials, he argued that Columbia had promised but failed to teach him wisdom. Both the trial and appellate court granted summary judgment for the university, pointing out that wisdom cannot be taught and no rational person would believe that it can.

But in the 1970s, a series of serious challenges has been made under the heading "educational malpractice."[54] The fact that none has yet succeeded does not mean that none will. Courts were equally reluctant to enter the field of medical malpractice, and for similar reasons—that healing (learning) was a mysterious process, that doctors' (educators') expertise was beyond the understanding of judge and jury, and that attaching legal consequences to doctors' (educators') errors would too heavily burden, if not destroy, the health care system (or public schools). So, just as the law did finally choose to make health care providers take financial responsibility for their negligence, school officials may well be required to do the same at some future date.

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[53] Trustees of Columbia Univ. v. Jacobsen, 53 N.J. Super. 574, 148 A.2d 63 (App. Div. 1959), *aff'd* 31 N.J. 221, 156 A.2d 251 (1959).

[54] Peter W. v. San Francisco Unified Sch. District, 131 Cal. Rptr. 854, 60 Cal. App. 3d 814 (1976); Pierce v. Board of Ed. of City of Chicago, 358 N.E.2d 67 (Ill. App. 1976), *rev'd* 370 N.E.2d 535 (Ill. 1977); Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 418 N.Y.S.2d 375 (1979); Hoffman v. Board of Ed. of City of New York, 49 N.Y.2d 121, 424 N.Y.S.2d 376 (1979).

The most recent case—and one that came very close to succeeding—is *Hoffman v. Board of Education of the City of New York*. Its facts are memorable—a principal's nightmare. The plaintiff was the mother of a child mistakenly placed and kept for eleven years in classes for the retarded who sued the New York City School Board for damages resulting from the negligence of its employees (principals, teachers, and a psychologist). Mrs. Hoffman's claim rested on these undisputed events in her son Danny's school career: Although he suffered from a severe speech defect, his original placement at age five was made by a school psychologist on the basis of an intelligence test requiring verbal answers. The boy scored 74 on the test; 75 would have entitled him to placement in a normal class. His mother, a German-speaking widow with a junior high school education, was told by a principal at the first school that Danny was Mongoloid and needed either institutional care or, at the least, placement in classes for the mentally retarded. (The diagnosis of Mongolism seems to have been made solely by casual visual observation of the child. He was not, in fact, Mongoloid.) She was not told that these conclusions and his placement were based on a test or that she had the right, under school board policy, to demand retesting. Had she known of the testing, she could have told school officials that her son had scored 90 on a nonverbal IQ test given him eight months earlier.

The crux of the negligence claim was the handling of the school psychologist's report. It recommended that the child's intelligence be reevaluated within two years "so that a more accurate estimation of his abilities can be made." The recommendation was ignored for the next eleven years—despite the fact that at ages eight and nine Danny scored in the ninetieth percentile on reading-readiness tests. The child's achievement, as opposed to his intelligence and readiness to learn, actually deteriorated during the years, so that when he was eleven years old, for instance, his reading level was slightly lower than when he was nine. The boy was assigned to seven different schools during the years he spent in the New York City system, though his residence never changed. He made almost no academic progress, leaving school with less than second-grade reading and computation skills, and claimed to have suffered severe emotional harm for the false diagnosis and inappropriate placement. The error was detected only when the Social Security Administration required that the boy's IQ be retested for continuance of payments after his eighteenth birthday. At that point he scored over 100—in the "bright normal" range. He was then ejected from an occupational training program for the retarded, for which his new score made him ineligible, and allegedly suffered a lengthy depression as a result. At time of trial, Danny was 26 years old. He had worked half-time for several years as a delivery boy, earning $50 weekly. His speech defect still prevented most persons from understanding him (speech therapy was begun only after he left the public schools). A psychologist and a psychiatrist who testified for the plaintiff attributed his failure to achieve as an adult at a level commensurate with his intelligence to depression caused by his awareness that he was, for all practical purposes, uneducated, did not know how to earn a living, and did not understand (in his own words) "where he fitted into the world, and even where he fitted into his family." The plaintiff asked for damages for her son's emotional suffering and decreased intellectual development and earning capacity. The trial court, on a jury verdict, awarded $750,000. On appeal, the court upheld the finding of negligence and the school board's liability, though it did order that the plaintiff receive only $500,000 in damages.[55] The school board appealed to New York's highest court of appeals, where it won a narrow (4-3) victory.

Some months before the final *Hoffman* decision, the same court (the highest court of New York) had come closer than any other state supreme court before that time to recognizing a claim of educational malpractice. The earlier case, *Donohue v. Copiague Union Free School District*,[56] was brought by a high school graduate who could not read. In that case the court admitted that every element of a tort was present. Noting that doctors, lawyers, architects, and other professionals are held to have a duty of care toward their clients, the court saw no essential distinction requiring it to exempt educators. Though it would be difficult, it was not impossible, the majority concluded, to define the standard of care owed and to prove that educators' negligence, rather than other factors, caused the failure to learn. As for proof of injury, the court found it obvious that an illiterate person is damaged, economically and otherwise. Even so, the court held that it did not have to recognize a new ground for legal action if such recognition would be contrary to public policy—and it refused to do so. The court chose not to involve itself and the lower courts in reviewing educational policy-making and administration, pointing out that parents had ample opportunity under New York law to appeal educators' decision through administrative channels. In *Hoffman*, the later case, four of the seven judges who had formed the majority in *Donahue* again declined, on grounds of public policy, to allow judges to review the acts or omissions of school personnel, but this time three judges dissented. The dissenters focused on the school's failure to follow the direction for retesting given by its own psychologist. They approved the strongly worded opinion of the trial court, which had concluded, "Negligence is negligence, even if [the school board] prefer[s] semantically to call it educational malpractice."[57]

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[55] Hoffman v. Board of Ed. of City of New York, 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978).

[56] 47 N.Y.2d 440, 418 N.Y.S.2d 375 (1979).

[57] The intermediate court's decision in *Hoffman* (64 A.D.2d 369, 410 N.Y.S.2d 99 at 111 [1978]) expresses a sense of outrage rarely seen in legal opinions—for example: "[N]ot only reason and justice, but the law as well cry out for an affirmance of plaintiff's right to recovery. Any other result would be a reproach to justice."

Hoffman illustrates the particular dangers that arise from diagnosis and treatment of special education needs. This is the area of placement in which school employees' mistakes seem most likely to occur—and most likely to be costly. Principals and classroom teachers should be vigilant in looking for children in regular programs who are not progressing normally. However, once children are identified as having special needs, North Carolina principals no longer have ultimate responsibility for placing them. Final decisions on special education placement are made by an administrative committee for each school unit,[58] although the principal does preside over the school-based committee that forwards recommendations to the administrative committee.[59] Since his responsibility is less than in other states, the principal's liability is also less.

Another troublesome issue that has figured in malpractice claims is whether the school has been truthful with parents about the child's progress. Two courts that were unwilling to award damages simply for the student's failure to learn stated a willingness to do so in future cases if parents prove that school officials deliberately misled them about their child's academic status.[60] This deliberate act would be a tort—fraudulent misrepresentation. Presumably the tort would be proved by such evidence as the school's failure to send written reports, hold conferences, or respond to inquiries or, worse, the school's assuring parents that the child was progressing satisfactorily when it knew that he was not. Viewed in this light, the practice of "social promotion" itself might be seen as an intentional tort. Indeed, that was the plaintiffs' claim in the two cases mentioned above. Principals would do well to consider the adequacy and frankness of their communications with parents and those of their teachers regarding students' progress.

Since the principal is in charge of the school's instructional program and supervises teachers' work, it seems reasonable to expect him to see to it that every student has an adequate opportunity to learn. In fact, that basic assumption about the principal's role is embodied in the statutory authority over placement given him in G.S. 115-150—the authority to grade and classify pupils. Assuming that the principal does have a duty to provide minimally satisfactory educational opportunities, that duty can be met by (1) his conscientious evaluation and supervision of the faculty, (2) his informing himself of which students are not making satisfactory progress, and (3) his informing the parents that a child is having academic problems and working with them to help the child overcome those problems.

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[58] 16 N.C.A.C. 2E.1507 (1979).

[59] 16 N.C.A.C. 2E.1506 (1979).

[60] Peter W. v. San Francisco Unified Sch. District, 131 Cal. Rptr. 854, 60 Cal. App. 3d 814 (1976); Donohue v. Copiague Union Free Sch. District, 407 N.Y.S.2d 874 (1978), *aff'd* 418 N.Y.S.2d 375 (1979). The Supreme Court of Oregon recently upheld a student's claim for fraudulent misrepresentation against a community college. He had enrolled on the assurance that he would receive advanced welding training, but three years later the necessary instructional equipment was still on order. Dizich v. Umpqua Community College, 287 Or. 303, 599 P.2d 444 (1979).

Chapter 3

STUDENT DISCIPLINE

Principals have the authority to discipline students. Despite the fears expressed by many, including some members of the United States Supreme Court,[1] the principal's legal authority is not materially less today than in the past. Still, students have always had certain rights under the law, and it is more important than ever for a principal to understand them.

A student has few affirmative rights—that is, rights to pursue a course of conduct contrary to the wishes of school authorities. Such as they are, his affirmative rights largely proceed from the First Amendment, which guarantees freedom of speech, religion, press, and assembly. But he does have a growing number of negative rights. This term refers to his legal ability to prevent school officials from taking a whole group of actions contrary to his interests. The category includes the right to be free from discrimination based on race, sex, or marital or parental status; the right to certain standards of fair procedure (due process) before the school imposes penalties for violating its rules; the right to have his school records kept private (see Chapter 2); and the right to certain protections of the Fourth Amendment (which forbids most searches without consent or a warrant). Although some of these rights arise from federal legislation and regulations of federal agencies, most of them have been established by decisions of federal courts. Of the court-established rights, only those confirmed by the Supreme Court can be viewed as final (and those too are subject to redefinition). Many of the rights claimed by students have been recognized by only one or more decisions in federal district or circuit courts, and recent ones at that, so that students and school officials share a feeling of uncertainty about them. At this period students' rights are in flux. Though the pendulum may be swinging slowly toward protection of the rights of individual students, it is not yet clear how far the courts and Congress will go in limiting the school's authority. The wise course for a principal is to learn the areas in which legal difficulties are likely to arise and to seek direction from the school board or advice from the superintendent and, if possible, the board attorney in developing policy in those areas.

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[1] The four dissenting justices in Goss v. Lopez, 419 U.S. 565, 599 (1975), which established due process requirements for short-term suspension, predicted that "the impact upon public education will be serious indeed. The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system." In practice, though, *Goss* requirements apparently are not burdensome for school administrators.

School law materials often make the point that students are entitled to due process, both substantive and procedural. Those legal terms simply mean that any court that reviews school discipline will be concerned first with whether the rule was fair and second with whether it was fairly enforced. One section of this chapter deals with a question of the basic fairness of school rules or substantive due process—the section on student expression. The other sections discuss procedural due process—that is, the methods for enforcing school rules: corporal punishment, suspension, expulsion, searches to uncover evidence of rule-breaking, lowering of grades, exclusion from extracurricular activities and privileges, and cooperation with law enforcement authorities. Readers should not be much concerned, however, over whether a principle under discussion involves procedural or substantive due process, since any actual disciplinary situation is likely to raise both issues.

Regulating Student Expression

Nearly forty years ago in a case called *West Virginia State Bd. of Education v. Barnette,*[2] the United States Supreme Court settled the question of whether students have First Amendment rights. They do—extensive rights. Again in 1969 the Court made the same point in a case whose often-quoted passages bear repeating here:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State . . . . First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[3]

Since then various lower courts have defined students' rights of expression to include speaking, writing, wearing insignia, placing advertisements, carrying signs, and distributing on or off school grounds material produced by themselves or others. The spectrum of topics on which they may express themselves is broad: school business (including sharp criticism of how it is handled), personal concerns such as sex and health, and social, philosophical, and political issues of every sort.

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[2] 319 U.S. 624 (1942).

[3] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) [hereafter, Tinker].

Their rights of expression are not unlimited, however. Courts do not accord students full First Amendment privileges. The reasons for this are that, first, students are not adults, and second, they function in the necessarily limited setting of the school community. The Supreme Court stressed both limitations in the *Tinker* case (quoted above), and the Fourth Circuit Court of Appeals, which has jurisdiction over North Carolina, has emphasized them also. The first time the Fourth Circuit Court ruled in a school newspaper case, it stated that students' constitutional rights are fewer than other citizens' rights and that high school students have fewer rights than college students—though it decided the case for the high school plaintiffs. In the court's words: "Free speech under the First Amendment, though available to juveniles and high school students, as well as to adults, is not absolute and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed."[4] Courts fully recognize that the main business of the public school is formal education for its students and that nothing, however valuable in itself, should interfere with that goal. Thus activities that must be tolerated in public streets and parks or even on school grounds[5] may well be forbidden in school corridors and classrooms.

Four types of students' expression can be forbidden—libel, obscenity, material that can reasonably be predicted to cause substantial disruption of school activities, and material that encourages actions that endanger student health or safety. Unfortunately, the rule is far harder to apply than to state. Understanding the situation for each of these areas involves some further explanation of legal principles and case holdings.

Libel is not protected speech for anyone, student or adult—and certainly the school has a strong interest in keeping libel out of school-sponsored publications, since school officials as well as the libeling writer may be held responsible for any resulting harm.[6] Still, some school administrators tend to see libel in what is merely strong criticism of their own or other people's behavior, or perhaps they forget the substantial protection available under the law[7] to those who criticize public officials and public figures. Before censoring student expression as libelous, the principal should seek the advice of the school attorney.

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[4] Quarterman v. Byrd, 453 F.2d 54, 57 (4th Cir. 1971).

[5] Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971).

[6] W. L. Prosser, *The Law of Torts* (St. Paul, Minn.: West Publishing Co. 1964), p. 794.

[7] The seminal case is New York Times v. Sullivan, 376 U.S. 254 (1964), in which the Supreme Court held that public officials may not recover for defamatory falsehoods concerning their official conduct unless the allegations were made with actual malice—that is, knowing that they were false or with reckless disregard of truth. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), extended the "actual malice" standard to those who defame public figures. School board members are public officials/figures and superintendents almost certainly so. The only three courts to consider whether public school teachers are either public officials or public figures have divided. Basarich v. Rodeghero, 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974); Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978)—teacher is a public official under *Times*. Franklin v. Lodge 1108, B.P.O.E., 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979)—teacher neither a public official nor a public figure.

Obscenity presents a similar situation in one respect; that is, the cases on student expression indicate that school officials quite often ban as obscene material that is not, in point of legal fact, obscene. Defined in law, obscenity, at least for adults, is those expressions "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[8] Material that is merely coarse and vulgar or even profane and indecent is not to be confused with obscenity, and it is not certain to what extent such material can be prohibited.[9] Again, the principal should confer with the school attorney on whether certain material is sexually explicit or legally obscene before attempting to censor it.[10]

The third form of unprotected speech may be the most difficult of all to identify. When can a student's speech or action reasonably be predicted to cause substantial disruption? The principal's job is easiest when the expression has already occurred and has caused a disruption that he thinks is substantial. In that case, he can forbid further expression and be assured that a court will give him the benefit of any doubt as to whether what happened materially interfered with school activity. But often the principal learns of the expression before it occurs or is publicized and predicts that it *will* cause substantial disruption. In that situation, courts agree that the principal can—in fact, must—prevent disorder if possible. The difficulty comes in getting agreement on what "disruption" is and when it is reasonable to believe that it will occur. Examples from the cases may be helpful.

In the following cases the court that reviewed the facts felt that the school official overreacted, that his fear of disruption was unrealistic: Five students who had worn black armbands as a protest of the Vietnam War were subjected to a few hostile comments from classmates and it

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One federal district court has held that a student, even though serving as vice-president of the student body, was not a public figure, and it upheld administrators' decision to seize copies of the school paper libeling him. Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979). But a state appeals court found no tortious invasion of privacy in publication of University of Maryland basketball players' academic difficulties, since the players were public figures; Bilney v. Evening Star Newspaper Co., 406 A.2d 652 (Md. App. 1979).

8. Miller v. California, 413 U.S. 15, 24 (1973).

9. Papish v. Board of Curators, 410 U.S. 667 (1973); Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973); Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973); Vail v. Bd. of Educ. of Portsmouth Sch. Dist., 354 F. Supp. 592 (D.N.H. 1973); Jacobs v. Bd. of Sch. Comm'rs, 490 F.2d 601 (7th Cir. 1973), 420 U.S. 128, *vacated and dismissed* (1975); Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979).

10. North Carolina attempts by statute to forbid the distribution to minors of material that is not obscene as to adults [G.S. 14-190.1(d), -190.7, -190.8, -190.10) (1979 Supp.)]—an effort that the United States Supreme Court found constitutional in Ginsberg v. New York, 390 U.S. 629 (1968). Exactly what can constitutionally be forbidden as to minors is still unclear, however, and at a minimum a court would have to determine that the material was forbidden before school officials could prevent its publication [G.S. 14-190.2 (1979 Supp.)].

was rumored that other students might beat them up.[11] Students had distributed a paper off school grounds and a few students (despite the distributors' warning not to do so) carried their copies into school.[12] A nonstudent who was wearing signs and giving out leaflets on a college campus had his signs torn from his body and anonymous callers to the campus police threatened violence if he was not removed.[13] In five other cases, school officials produced no evidence pointing toward a disturbance. They simply asserted that, judging from the nature of the expression, disruption was likely to follow. The courts disagreed.[14]

In the following instances, on the contrary, disruption either occurred or the courts concluded that it was reasonably predictable: A student addressing an angry crowd of students told them to "go down there and take the park" and the crowd obeyed, leaving one person dead and several injured in a police confrontation.[15] Students gave out leaflets in the week before examinations that stated falsely that school was canceled for two days.[16] Students were advised to "get off their butts and fight for their rights," presumably against school authorities.[17] Students who were agitating both for and against nonrenewal of a teacher's contract planned a walkout from assembly, held press conferences on school grounds, and walked out of class.[18] Some abusive encounters had already occurred between students protesting the Vietnam War and other students, and the principal feared violence because one-third of the student body came from military families (a North Carolina case).[19] In another case the disturbance predicted was more subtle, consisting of psychic harm to individuals. The editor of a high school newspaper planned a survey by individual questionnaire of students' sex attitudes and behavior, to be followed by an article analyzing and commenting on the results. His principal, however, forbade the survey for fear of emotional damage to some students. The Second Circuit Court of Appeals, after hearing expert testimony that students might be harmed, upheld the principal.[20] In reviewing a principal's prediction of disruption, some courts have been persuaded that the school's position was logically inconsistent because the offensive material appeared elsewhere at school with no disruption.[21] For example, a tenth-grade student's expulsion for possession of obscenity was reversed when he proved that the words judged obscene also appeared in a copy of *Harper's* magazine in the school library and in *The Catcher in the Rye*, which was required reading for eighth-graders at the school.[22]

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[11] Tinker, 393 U.S. 503 (1969).

[12] Sullivan v. Houston Indep. Sch. District, 307 F. Supp. 1328 (S.D. Tex. 1969); for later stages of case, *see* 333 F. Supp. 1149 (S.D. Tex. 1971) and 425 F.2d 1071 (5th Cir. 1973); and *see* Thomas v. Board of Education, Granville Cen. Sch. District, 607 F.2d 1043 (2d Cir. 1979).

[13] Jones v. Board of Regents, 436 F.2d 618 (9th Cir. 1970).

[14] Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970); Channing Club v. Board of Regents, 317 F. Supp. 688 (N.D. Tex. 1970); Scoville v. Board of Educ. of Joliet Township High Sch. Dist. 204, 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (Ill. 1970); Koppell v. Levine, 347 F. Supp. 456 (E.D.N.Y. 1972); Shanley v. Northeast Ind. Sch. District, 462 F.2d 960 (5th Cir. 1972).

[15] Siegel v. Regents of University of California, 308 F. Supp. 832 (N.D. Cal. 1970).

[16] Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970).

[17] Norton v. Discipline Committee of East Tenn. State University, 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970).

[18] Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).

[19] Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971).

[20] Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977).

If the principal learns of or foresees serious disruption or any violence, then of course he must act immediately to stop it. But if his concern is less serious, it should be met by regulating the time, place, and manner of student expression rather than by forbidding it altogether. The Supreme Court has held that school authorities may regulate time, place, and manner without abridging First Amendment rights.[23] For instance, students certainly could be kept from giving out literature or making speeches during classes or assemblies. Perhaps they can even be required to submit all material to the principal before distributing it (but see the discussion on pages 42-43 on legal requirements for such a provision). But there is a fine line that each principal will have to judge between regulating student activity reasonably, so that it does not interfere with the school's main business, and burdening students with regulation to the point where their rights of expression are lost or greatly diminished. As the Supreme Court said when it struck down a city ordinance that allowed distribution of pamphlets in streets but not in alleys, a citizen has the right to exercise the First Amendment in all appropriate places, and that right should not be denied through attempts to confine expression to a few places.[24] Any regulation, therefore, should be precisely tailored to its purpose of keeping order, so as not to discourage student expression further than necessary.

The fourth type of prohibited speech was recently identified by the Fourth Circuit Court of Appeals. (North Carolina is in the fourth circuit.) The case, *Williams v. Spencer*,[25] concerned distribution of a paper containing an advertisement for drug paraphernalia. The principal and other school officials felt that the ad violated the part of the school policy on distribution of literature forbidding material that "encourages actions which endanger the health or safety of students." The trial and appellate courts agreed that the ad violated the policy and that the policy was not an unconstitutional limitation on students' free-speech rights. The appellate court also noted that (1) "commercial speech" such as advertising often is not given as much protection as other types of speech, and (2) the time limits set in the school policy for appealing principals' or the superintendent's decisions in such matters were reasonable.

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[21] Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969); Channing Club v. Board of Regents, 317 F. Supp. 688 (N.D. Tex. 1970); Peterson v. Board of Education, 370 F. Supp. 1208 (D. Neb. 1973); Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973), *rehearing en banc* (on another point), 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

[22] Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).

[23] Grayned v. City of Rockford, 408 U.S. 104 (1972).

[24] Schneider v. Irvington, 308 U.S. 147 (1939). In Solid Rock Foundation v. Ohio State University, 478 F. Supp. 96 (S.D. Ohio 1979), the court struck down a policy that confined distribution of the plaintiff's paper to eight points on campus while the official student newspaper was distributed at 145 points.

[25] —F.2d— (4th Cir. 1980); [No. 78-1590, June 12, 1980].

An issue that arises regularly is whether schools can at least control official, school-financed publications. Courts have unanimously said no. It may seem only fair, on first consideration, that schools should have total or at least greater control over what goes into the school newspaper than into individual students' or outsiders' productions, but every court with which I am familiar that has considered the matter has decided otherwise. In probably the earliest major decision, a state college president refused to allow the paper to criticize the governor or state legislators on the theory that they were the owners of the paper and no paper would criticize its owners. The court found the president's rule unreasonable. It announced the principle that is still followed: Once the institution establishes a forum for the expression of ideas, it may not pick and choose among the ideas sought to be expressed.[26] Cases since then have upheld the right of students to place ads on controversial political subjects in the school paper,[27] to publish works by both students[28] and outsiders[29] that are distasteful to school authorities, and to criticize the authorities themselves in the paper.[30] The same conclusion was reached—that financing is irrelevant to control, even in the difficult situation in which the editors violated state law and thus made both themselves and school officials subject to possible criminal charges.[31]

Even when the ideas expressed are repulsive to the ideals of the educational institution, courts refuse to let authorities censor the publication or cut off its financial support.[32] Our own federal circuit court of appeals has twice ruled on the point. In a 1973 case, *Joyner v. Whiting*,[33] the court required the chancellor of North Carolina Central

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[26] Dickey v. Alabama Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub. nom.*, Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968).

[27] Zucker v. Panitz, 299 F. Supp. 102 (S.D. N.Y. 1969).

[28] Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973); *rehearing en banc on another point*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

[29] Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

[30] Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971).

[31] Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970)—court held state law criminalizing flag desecration unconstitutional as applied to depiction of burning flag on newspaper cover.

[32] Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973)—paper urged exclusion of whites from predominantly black school; Panarella v. Birenbaum, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (1973)—paper printed articles attacking religion.

[33] 477 F.2d 456 (4th Cir. 1973).

University to continue financial support of the student newspaper despite the editor's advocacy of racial segregation. The chancellor argued that, in addition to being offensive, the paper's position could not be supported with state funds without violating the Fourteenth Amendment and the Civil Rights Act of 1964. The federal district court agreed, but the appeals court differentiated between action and mere advocacy, ruling that the latter cannot be suppressed. While conceding that institutions need not establish papers and can stop publishing an established paper for reasons unrelated to the First Amendment, the court concluded, "But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment." On the other hand, the court readily agreed that the university could block the editor's intention to allow only American blacks to work on the paper and only black businesses to advertise. There is no reason to think the holding would have been different for a high school paper. In a second case,[34] the federal Fourth Circuit Court of Appeals applied the doctrine that a public forum, once established, cannot be closed to an article on birth control in a high school paper. The court rejected both the school board's arguments that (1) students beneath the compulsory attendance age are a captive audience to whom the public forum doctrine is inapplicable, and (2) the proposed article undermined the board's authority over curriculum. (Board policy forbade the teaching of birth control.) The cases make the same point repeatedly: Once the school invites students to air their views—whether through newspapers, literary magazines, speaking programs, or bulletin boards—the door is open and must remain open to expression of every kind with the four exceptions noted above.

What may a school do, then, to regulate student expression? The Fourth Circuit Court has stated in three decisions that it would not object to a properly drawn school regulation requiring material to be reviewed and approved by a school official before distribution.[35] But so far the court has not approved a specific school prior-review policy, since in each of the three cases it struck down the regulation under review as improper in one or more respects. In the second case the court set out these criteria:

> Such prior restraints must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write.
>
> A prior restraint system, even though precisely defining what may not be written, is nevertheless invalid unless it provides for:
>
> (1) A definition of "Distribution" and its application to different kinds of material;

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[34] Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977).

[35] Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975).

(2) Prompt approval or disapproval of what is submitted;
(3) Specification of the effect of the [school official's] failure to act promptly; and,
(4) An adequate and prompt appeals procedure.[36]

The most recent of these three cases[37] illustrates how difficult it will be to draft a valid regulation. The school policy called for the principal to review all material before distribution and to forbid distribution of libel, obscenity, or material that would cause substantial disruption. The court invalidated the school's policy on the following grounds: (1) The policy neither defined "substantial disruption" and "material interference" with school activities nor described the criteria the principal should use in predicting such eventualities. (2) Its definition of "libel" was broader than the United States Supreme Court's definition in a landmark libel case.[38] (3) Its procedure for reviewing the principal's decision was not clear enough, nor was the review quick enough (it was to take place at the next regularly scheduled meeting of the school board). (4) Last, the policy did not specify that the student could appear during the review process to argue his case. Besides pointing out these errors, the court recommended that a student/faculty committee be created to decide where on school property material could be distributed, what type of material might distract and disrupt, and how serious a disruption would justify banning the material. It is perhaps possible, by following the court's advice, to draft a policy on prior submission that will be acceptable to the Fourth Circuit Court, but doing so will require considerable effort and probably an attorney's help.

School officials can expect greater success if they try to forbid sales or solicitations on school grounds. The decisions in three cases, one of them from North Carolina, have held that students' rights are not violated by rules against students selling items or asking for money or against commercial enterprises doing business at school. One court saw students as a captive audience to be protected from appeals for money, claiming that students who solicit are directly competing with the school for other students' time and attention.[39] Another found no violation of a businessman's First Amendment (free speech) rights in a university rule forbidding commercial solicitation in residence halls.[40] In the third, a North Carolina student sued for the right to sell his own paper at school and also to form a Free Press Club, one of whose major activities would be selling a variety of newspapers. The federal district court upheld the principal's refusal, which was based on school board policy forbidding sales on school property. The court saw no First Amendment issue at stake, noting that the board was merely exercising its statutory authority[41] to regulate charges.[42] It was probably significant that in each case the school rule was of long standing and unrelated to a desire to suppress expression.

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[36] Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).

[37] Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975).

[38] New York Times v. Sullivan, 376 U.S. 254 (1964).

[39] Katz v. McAulay, 438 F.2d 1058 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (N.Y. 1972).

[40] American Future Systems, Inc. v. The Pennsylvania State University, 464 F. Supp. 1252 (M.D. Pa. 1979).

In most instances schools are free to discipline students whose forms of expression cause disruption—though of course they cannot punish a student simply because others react badly to his opinions. (In fact, they are required to make reasonable efforts to protect a student in that situation.[43]) In a slight majority of the cases the courts have concluded that a student can be punished for violating a school rule against distribution of literature, even if the rule is later found unconstitutional,[44] but the Fourth Circuit Court is among the minority that hold to the contrary.[45] Therefore, before taking disciplinary action against a student, a North Carolina principal should be confident that the rule the student broke is constitutionally valid. Nearly all courts[46] would agree that students can be disciplined for disobeying valid rules regulating expression or, even without a rule, for deliberately causing disruption of school activities.

Corporal Punishment

Corporal punishment, defined broadly as any form of punishment that inflicts physical pain,[47] is a disciplinary method used particularly often in North Carolina. One national poll of teachers cited 70 per cent of the respondents from the South as having used corporal punishment in the preceding year, compared with 54 per cent of respondents from the

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[41] N.C. Gen. Stat. § 115-35(f) (1978).

[42] Cloak v. Cody, 326 F. Supp. 391 (M.D.N.C. 1971), *vacated as moot*, 449 F.2d 781 (4th Cir. 1971).

[43] Jones v. Board of Regents, 436 F.2d 618 (9th Cir. 1970); Shanley v. Northeast Indep. Sch. District, 462 F.2d 960 (5th Cir. 1972).

[44] Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969); Baker v. Downey City Bd. of Education, 307 F. Supp. 517 (C.D. Cal. 1969); Graham v. Houston Indep. Sch. District, 335 F. Supp. 1164 (S.D. Tex. 1970); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071 (1973).

[45] Scoville v. Board of Educ. of Joliet Township High Sch. Dist. 204, 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970); Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972); Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975).

[46] In Karp v. Becken, 477 F.2d 171 (9th Cir. 1973), however, the court invalidated a student's suspension, holding that it was proper to keep him from expressing himself under the circumstances but not to punish him for trying. The court said, "The balancing necessary to enable school officials to maintain discipline and order allows curtailment but not necessarily punishment."

[47] Usually, corporal punishment means paddling, but incidents of slapping, jerking, hair-pulling, etc., also occur. I also include in the definition punishment in which the punisher does not touch the student—such as forcing him to eat cigarettes, to stand for long periods, to run laps, or to do push-ups, each of which has been reported in news stories. Corporal punishment does *not* include physical restraint of a student by a principal or teacher to prevent harm to the student, another person, or property; nor does it include actions taken in self-defense.

Midwest and 34 per cent from the East.[48] The North Carolina Association of Educators reports that it helps to defend about 35 teachers per year who are accused of excessive corporal punishment.[49] While only five states forbid corporal punishment by state statute,[50] North Carolina is apparently unique in its refusal to let local boards of education forbid it if they wish. These facts indicate that corporal punishment is and will continue to be a problem for North Carolina principals. For their own sake and their teachers' sake, they need a clear understanding of the legal issues involved.

Corporal punishment may no longer be a matter of constitutional law. In 1977 the United States Supreme Court held in *Ingraham v. Wright*,[51] first, that the Eighth Amendment (forbidding cruel and unusual punishment) does not apply to schools and, second, that while corporal punishment does to some extent deprive a student of the liberty guaranteed by the Fourteenth Amendment, he need not receive any prior due process such as a warning or a hearing. On the second point, the Court said that the existence of state law remedies (typically, civil or criminal assault and battery charges) provides after-the-fact due process that is sufficient protection from unreasonable force. Since that decision, almost no litigation on corporal punishment has occurred in the federal courts. Our own circuit court of appeals, however, has reopened the door that the Supreme Court seemed to have closed. In a recent case the Fourth Circuit held that in rare circumstances corporal punishment could violate the federal Constitution—that corporal punishment might deprive a student of "substantive due process." That would be true, the court said, when "the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice and sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane use of official power literally shocking to the conscience." The case was sent back for a trial on whether such a situation had existed.[52]

In most cases, the area is governed by state law in North Carolina, specifically by G.S. 115-146:

> Principals, teachers, substitute teachers, voluntary teachers, teachers' aides and assistants and student teachers in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order. No county or city board of education or district committee shall

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48. "Theorists Seek Roots of South's Violent Tradition," Raleigh *News and Observer*, November 24, 1975, p. 1.

49. "If You Spank 'Em, Pay Your Insurance," *North Carolina Education* (November 1977), 12.

50. "State Law and the Status of Corporal Punishment in the Schools," *Inequality in Education* (Cambridge, Mass.: Center for Law and Education, September 1978), pp. 52-53.

51. 430 U.S. 651 (1977).

52. Hall v. Tawney (No. 78-1553, May 9, 1980).

> promulgate or continue in effect a rule, regulation or bylaw which prohibits the use of such force as is specified in this section.

The statute is broad. It permits a wide variety of school personnel to administer corporal punishment and forbids any board to prohibit corporal punishment entirely. The privilege to use force is limited to "reasonable" force, but the statute does not define this term. Early North Carolina case law, however, tells us that, at a minimum, force is unreasonable if it is actuated by malice or anger[53] or causes permanent injury.[54]

School boards may adopt policies regulating and in effect limiting corporal punishment, and many have done so. Most North Carolina school units revised their policies in 1975 to comply with a federal court decision[55] that required certain steps before using corporal punishment. Although the decision in *Ingraham* (1977) overruled the earlier case as to the constitutional necessity for such requirements, many units retain them because they consider the procedures to give the best possible legal protection against suits seeking state law remedies for excessive corporal punishment.

A policy that seems universal is to require that a second adult be present when the punishment is administered. The benefits of the practice are obvious: The second adult can see (and later bear witness, if necessary) that the punishing official is not carried away by anger or malice and does not inflict serious injury. Practice does vary on the identity of the two adults. In some units teachers handle corporal punishment, witnessing for each other. In others the principal inflicts it, using his secretary or other office staff as witnesses. The statute allows a number of persons besides teachers and principals to administer punishment; still, it is my opinion that a unit takes an unnecessary risk if it gives substitute teachers, student teachers, aides, or volunteers that authority. The regular teacher and the principal are the persons most likely to be professionally competent to discipline (and to be perceived by a judge or jury as competent).

Some board or individual school policies contain such requirements as these:

—That students be warned of the possibility of corporal punishment;
—That other, lesser forms of punishment be used first;
—That the parts of the body to which punishment is administered be confined to those named;
—That the method or instrument to be used be as specified; to the exclusion of others—for instance, paddling but no slapping;
—That the amount and frequency of punishment be as specified;
—That each incident be documented by a written report to the principal and often the parents.

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[53] State v. Stafford, 113 N.C. 635, 18 S.E. 256 (1893).

[54] Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904).

[55] Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *summarily aff'd*, 423 U.S. 907 (1975).

Despite the breadth of the North Carolina statute and the usual absence of a constitutional issue, corporal punishment can produce several kinds of litigation. First, the person who administers it can be charged with either civil or criminal assault and battery. Charges of this sort are brought and reported in the papers several times a year in North Carolina, but there has been no reported case of a judgment against North Carolina school personnel in modern times.[56] Still, since suits succeed occasionally in other states, principals must recognize that such a suit is possible. Second, the individual may be charged with child abuse under G.S. 14-318.2 or -318.3 (certain kinds of child abuse are a felony). Three North Carolina teachers in two separate instances have been convicted of child abuse in state district courts.[57] Although in both cases the convictions were overturned by the superior court, this form of suit also remains a possibility.

A third possibility is dismissal for insubordination or for failure to comply with a board of education policy. This has occurred in the state twice recently. A Winston-Salem teacher was dismissed for failure to follow the unit's rules on corporal punishment. The North Carolina Court of Appeals upheld the dismissal, finding that local policies on corporal punishment do not violate the state statute permitting the practice and that a teacher's refusal to comply with local policy is a proper basis for termination.[58] In the second case, a Charlotte teacher was dismissed for insubordination when she disobeyed her principal's order to stop corporal punishment of her orthopedically handicapped students.[59]

Suspension and Expulsion

A newly revised state statute, G.S. 115-147 (revised 1979), sets out some, though not all, of the procedure that must be followed in suspending or expelling a public school pupil. The statute now requires the local board to adopt written conduct rules and discipline procedures and to distribute them to students and parents each year as school begins. The principal acting alone may then suspend a student for ten or fewer days for willfully violating rules. If the suspension is to be longer than ten days, the superintendent must give prior approval. But for a long suspension, the student or parent has a right to appeal the decision to the school board. (Previously, case law had indicated that students had such a right but state statutes were unclear.) A student suspended for ten days or fewer need not lose much academic credit, since he must be permitted to take quarterly, grading period, or semester exams missed during his suspension. For the first time, state law seems to permit expulsion—that is, permanent exclusion from school.[60] A child of fourteen or older who is convicted of a felony and whose presence in school clearly threatens the health or safety of others may be expelled. The statute further provides that the school may suspend or even expel a child with special needs without incurring an obligation to continue services during the disciplinary period unless the child's offense was caused by neglect of his special need.

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[56] The Raleigh *News and Observer* (March 26, 1980) did report an out-of-court settlement between an elementary school principal in Taylorsville, North Carolina, and the parents of a 13-year-old boy whom he had spanked. The amount was reported to be under $1,000.

[57] In State v. Meshaw and State v. Scoggins (N.C. Dist. Ct., July 18, 1977), two Bladen County teachers were convicted. They appealed to superior court, where the charges were dismissed for lack of evidence. Raleigh *News and Observer*, October 11, 1977. Interestingly, a doctor and the county director of social services brought the charges, not the parents. In the second case, a Lenoir County teacher was convicted in district court in May 1978, but the conviction was reversed in a jury trial six months later. Raleigh *News and Observer*, November 7, 1978, p. 25, and November 9, 1978, p. 29.

[58] Kurtz v. Winston-Salem/Forsyth County Board of Education, 39 N.C. App. 412, 250 S.E.2d 718 (1979). Mrs. Kurtz's dismissal was based on three of the grounds set out in G.S. 115-142(e)(1)—inadequate performance, insubordination, and failure to comply with such reasonable requirements as the board may prescribe. The court found only the third charge to be supported by the evidence.

[59] Baxter v. Poe, 42 N.C. App. 404 (1979). Mrs. Baxter was charged with inadequate performance, insubordination, neglect of duty, and failure to comply with the board's reasonable requirements. The court found substantial evidence of all charges in the hearing testimony on the teacher's corporal punishment practices.

Federal constitutional law as well as state law affects discipline procedures, so that a good deal of settled law on suspension/expulsion is not reflected in the statute. In a recent case the United States Supreme Court concluded that even students suspended for brief periods deserve to have certain basic rules of fairness (due process) applied to them.[61] As a result of that case, students suspended for any period at all,[62] no matter how brief, must be told what they are accused of (oral notice is adequate) and what the evidence against them is if they deny the charge, and then must be given a chance to explain. This "hearing" may be immediate and wholly informal. Moreover, the Court recognized school authorities' need to act quickly in dangerous circumstances. If the official fears that the student's "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," he may suspend the student summarily and exchange explanations later. These due process requirements are minimal, but they must be observed in all suspensions.

When more is at stake, as in long-term (more than 10 days) suspensions or in expulsions, the courts give students greater protection. It is generally accepted that a student has a constitutional right to a formal hearing before being excluded from a public school for a long period.[63] Besides the hearing itself, the school must forewarn the student of the kind of behavior that merits long-term suspension or expulsion and then, if he commits an offense that is grounds for such exclusion, send him specific written notice of the charges against him and the evidence. The hearing decision must be supported by the evidence. Other rights are less clearly established. In the interests of a fair hearing, for instance, it is best to have a person other than the school official who was involved in the misbehavior serve as the trier of facts, but the courts are nearly evenly divided on whether having a person who is involved in the matter conduct the hearing invalidates it. Legal opinion is similarly divided on a student's right to use an attorney at the hearing and whether the student must be allowed to question the persons who accuse him of misconduct. (It is clear that the rules of evidence that apply in a courtroom need not be followed in the hearing.) One federal court case from the Western District of North Carolina has said that students do have rights to an attorney and to cross-examination.[64] Though it cannot now be said that these rights and certain others in dispute are legally required throughout North Carolina, a prudent principal and school board will grant very considerable due process to students threatened with the severe discipline of long-term suspension or expulsion.[65]

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[60] Formerly, G.S. 115-147 used the terms "suspension" and "dismissal." The Attorney General's staff interpreted "dismissal" to mean a suspension that lasts until the end of the school year. The new statute uses the word "expel" without definition, but its title (N.C. Sess. Laws 1979, Ch. 874) and the Attorney General's staff interpret expulsion as permanent exclusion from school.

[61] Goss v. Lopez, 419 U.S. 565 (1975).

[62] "Suspended" here means excluded from school attendance rather than the numerous disciplinary techniques grouped under the term "in-school suspension."

Lowering Grades

Quite frequently a student's misconduct adversely affects his grades, for a range of reasons. The first, simplest explanation is that absence or lateness usually makes it impossible for him to master the material as well as if he had been present. This is a natural consequence that occurs even when the school does not interfere with the student's academic efforts. But in some instances school policy adds to the natural consequence by refusing to allow graded work assigned during an unexcused absence to be made up. Still a third possibility not uncommon in North Carolina is that the school may subtract points from the student's final grades for misconduct or absences, excused or unexcused, whether or not work has been made up. The effect on grades of this practice may vary from trivial to the extreme that existed in one unit several years ago in which every student suspended for as much as ten days automatically lost enough points to prevent his gaining semester credit in any subject.

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[63] Dixon v. Alabama State Bd. of Education, 294 F.2d 150 (5th Cir. 1961), cited approvingly in Goss v. Lopez, 419 U.S. 565 (1975).

[64] Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

[65] For a good discussion of the procedural aspects of discipline, see Robert E. Phay, "Student Discipline: Procedural Issues," in Ralph D. Stern (ed.), *The School Principal and the Law* (Topeka: National Organization for Legal Problems in Education, 1978).

In the situation first mentioned—when the school does nothing—there is no legal issue. As a matter of school or individual policy, a teacher could volunteer to help a student make up missed work, but there is no obligation to do so in most instances. One possible exception concerns certain children with special needs. G.S. 115-374 requires that a child with special needs who is suspended or expelled be provided services outside school if his disruptive conduct was caused by the lack of proper medication or appropriate educational or ambulatory services. In those presumably few cases, the school is legally obligated to help the student master the work that went on in his absence. The principal should remember too that federal regulations require schools to treat pregnancy and childbirth like any other temporary disability,[66] so that pregnant students must be helped to make up work missed if other disabled students are assisted.

But when the school goes further, either by refusing to accept made-up work or by lowering grades, legal issues arise. The General Assembly partially resolved one issue through its revision of the suspension statute, G.S. 115-147, in 1979. The statute now requires that "a student suspended pursuant to this subsection [on suspensions of ten or fewer days] shall be provided an opportunity to take any quarterly, semester, or grading period examinations missed during the suspension period." Thus, to that extent, a school administrative unit or school no longer may refuse students' requests to make up work and gain credit for it. The law does not address two other issues: whether less important graded work missed during a short suspension can be made up, and whether work missed during a longer suspension can be made up. Presumably it is still within school officials' discretion to decide these questions. There should, however, be a uniform policy for the entire unit, so that all suspended students are treated alike.

The final issue is whether the school may go so far as to reduce grades to penalize a student for absences or misconduct. A recent informal opinion of the North Carolina Attorney General states that school-imposed academic penalties for absences are permissible, whether the absences are excused or not. Thus the opinion finds valid a policy reducing a student's grades so many points for each day absent, whether absence was due to suspension, truancy, or illness. But the opinion does advise against reducing grades for any misconduct that does not produce absence. The Attorney General's conclusion is that absence may be penalized through grades but bad behavior may not, because the former directly affects academic work while the latter does not.[67]

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[66] HEW regulations under Title IX of the Education Amendments of 1972, appearing in 45 C.F.R. § 86.40(b)(4) (1978).

[67] Letter to James L. Newsom, attorney for the Durham County Board of Education, August 17, 1979.

There is no case binding in North Carolina to that effect, however, and several decisions from other jurisdictions reach a different conclusion. When the issue arose in New Jersey, the state commissioner of education (who has judicial powers) held that grades may not be used to penalize truancy or absenteeism.[68] The Court of Appeals of Kentucky invalidated a school policy that deducted five points from final grades for each unexcused absence. The court held that the state statute on suspension exhausted the possibilities of punishment for suspension, so that the plaintiff-student whose absence was due to a suspension could not lawfully be further burdened by the grade reduction.[69] The Illinois appeals court has considered the question twice. The first time it upheld a policy reducing grades in each subject by one letter for each day of truancy,[70] but later it reversed a lower court's dismissal and ordered trial on behalf of a student whose grades had been reduced 3 per cent for an unexcused absence.[71] A Colorado court also held that a school district's policy denying credit for more than seven unexcused absences exceeded its authority.[72] These cases from other states, the uncertainty about the practice among school lawyers,[73] and the willingness of students to litigate to protect their grades[74] should caution North Carolina school officials about the legality and wisdom of grade-reduction policies.

Exclusion from Extracurricular Activities[75]

Forbidding a student to take part in school-sponsored nonacademic activities may commend itself to the principal as a form of discipline less drastic and possibly even more effective than corporal punishment, suspension, or expulsion. Principals are justified, with few exceptions, in relying on their legal right to use this form of punishment. Exceptions arise in two kinds of situations: when the punishment is applied discriminatorily, and when the court concludes that exclusion from activities will be a substantial harm to the student. In the latter case, due process must be observed before discipline is imposed.

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[68] Minorics v. Board of Education of the Town of Phillipsburg, New Jersey Commissioner of Education (March 24, 1972), 1972 NEW JERSEY SCHOOL LAW DECISIONS 86.

[69] Dorsey v. Bale, 521 S.W.2d 76 (Ky. App. 1975).

[70] Knight v. Board of Educ. of Tri-point Community Unit Sch. Dist. No. 6J, 38 Ill. App. 3d 603, 348 N.E.2d 299 (1976).

[71] Hamer v. Board of Educ. of Township H. Sch. Dist. No. 113, 383 N.E.2d 231 (Ill. App. 1978). Perhaps the court's reversal resulted from the arbitrary nature of the school's penalty. Although the plaintiff left school for an emergency and brought an explanatory note from her parents the following day, the policy was enforced against her.

[72] Gutierrez v. Otero County Sch. Dist. R-1, 585 P.2d 935 (Colo. App. 1978).

[73] "It is clear that, until some additional case law is developed, no definitive legal answer can be supplied to the question, 'Can a student's grade legally be lowered for unexcused absences?'" "Student Grades and School Discipline—A Philosophical and Legal Question," *NOLPE School Law Journal* 7, no. 2 (1977), 151-52.

"Whether a student may be denied credits because of poor deportment is not an easy question to answer. The courts are very reticent about permitting boards to withhold credits which the students have earned." L. Peterson, R. Rossmiller, and M. Volz, *The Law and Public School Operation*, 2d ed. (New York: Harper & Row, 1978), p. 368.

[74] A report appeared in *Education USA* (September 3, 1979), p. 2, of a suit filed in federal district court challenging the Virginia Beach school system's policy. The plaintiff missed 34 class periods and was for that reason retained in the tenth grade though her grades were Bs and Cs.

[75] For a good though now somewhat dated discussion of the subject, see Edward L. Winn, III, "Legal Control of Student Extracurricular Activities," *School Law Bulletin* 7, no. 3 (Chapel Hill, N.C.: Institute of Government, July 1976).

The great majority of cases on exclusion from extracurricular activities do not deal with whether it is a proper means of punishing a student who deserves punishment. Instead, their central issue is whether the student or class of students deserves punishment of any kind. Most of the cases involve rules forbidding currently or formerly married students from participating in extracurriculars. Early cases usually held such rules valid. A 1960 case from Michigan was typical.[76] In it two outstanding students had each married during the summer vacation. Both were of age to marry and had been assured by the principal, on their inquiry, that no school penalties attached to marriage. Nevertheless, ten days after the second marriage, the school board enacted a policy confining the participation of married students to academic activities alone. The board based its policy on a desire to keep the students from exerting a bad influence on their peers and to require them to devote full time to their new family responsibilities. Although the students were represented by the Michigan Attorney General, both the trial court and the state supreme court supported the board. First, the courts found that nonacademic activities are not vital to education and hence deprivation of them is not a significant loss. That being so, any rational basis for the board's rule was sufficient to justify it, and the courts found that the reasons given provided a rational basis. More recently, however, courts have reversed themselves on the issue of rules punishing marriage. These newer cases hold that marriage is a fundamental right not to be penalized in any way without compelling necessity.[77] Secondarily, several cases also indicate that participation in extracurricular activities is an important part of the right to education.[78]

In a few other situations also the courts have held that the school had no right to penalize the students by any means. In three cases, girls who were prevented from engaging in various interscholastic athletics successfully challenged the school or state athletic association rule barring them as a denial of equal protection guaranteed under the Fourteenth Amendment.[79] In another case a university attempted to suspend certain members of its football team permanently for breaking a rule forbidding team members to engage in any form of protest or demonstration. The court found that the rule denied the players' First Amendment right of free speech.[80] In a case from the Fourth Circuit (North Carolina's) the court found for a student who was denied his football letter and invitation to the athletic banquet for violating the coach's hair-length code.[81] The court held that its previous disapproval of school hair codes[82] applied to all school-controlled activities, athletic as well as academic.

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[76] Cochrane v. Board of Educ. of Mesick Consol. Sch. District, 103 N.W.2d 569 (Mich. 1960). Courts reached similar conclusions in State v. Stevenson, 189 N.E.2d 181 (Ohio Ct. Common Pleas 1962); Starkey v. Board of Educ. of Davis County Sch. District, 381 P.2d 718 (Utah 1963); and Bd. of Directors of Indep. Sch. Dist. of Waterloo v. Green, 147 N.W.2d 854 (Iowa 1967).

[77] Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Texas 1972); Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972); Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972); Moran v. School Dist. No. 7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972); Bell v. Lone Oak Indep. Sch. District, 507 S.W.2d 636 (Texas App. 1974).

[78] Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Texas 1972); Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972); Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972).

A few of the cases already discussed raise the question of whether it is a significant loss for a student to be barred from extracurriculars, but their main issue is whether any punishment at all is justified. That is, if most students can participate, can one student be prevented from participating because that student is female, or is married, or is a protestor—or because he wears long hair? Other cases squarely raise the question of the importance of extracurriculars. Are these activities an essential part of the right to education, which is guaranteed by all but one of the states' constitutions? If so, then the Fourteenth Amendment's guarantee that no state shall deprive persons of life, liberty, or property without due process of law would apply to students, who would have a property and liberty interest in participation that they could not be deprived of without due process. Courts are divided on the question, the majority holding that extracurriculars are not an essential part of education.

Opposing ways of viewing that legal question were apparent from the beginning, as the majority opinion and dissent of a 1938 case[83] show. The plaintiff, co-captain of a high school football team, and several teammates were given sweaters and small goldplated footballs (valued at $2.50) as tokens of appreciation by local fans after a winning season. Rules of the state high school athletic association forbade acceptance of awards, except those presented by the association, on penalty of forfeiting eligibility. Although the students had not known of the rule and returned the items as soon as the point was raised, the association declared them ineligible for the next year's play. The trial court held for the plaintiff, but the state supreme court reversed in an opinion, saying, "Yes, the association's decision is arbitrary but no more so than the rules of football . . . . The plaintiff has many rights as a citizen and as a high school student, but he has no vested right in 'eligibility' . . . ." The single dissenting justice argued, to the contrary, that "when a high school student of this state is, by action of the Association, forbidden to participate in athletic contests, his opportunities are greatly restricted in an important field recognized to be an integral part of his education."

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[79] Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Yellow Springs Exempted Village Sch. District v. Ohio High School Athletic Association, 443 F. Supp. 753 (S.D. Ohio 1978); Leffel v. Wisconsin Interscholastic Athletic Assn., 444 F. Supp. 1117 (E.D. Wis. 1978).

[80] Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971). The players intended to wear black armbands during a game with Brigham Young University to protest the racial doctrines of Mormonism.

[81] Long v. Zopp, 476 F.2d 180 (4th Cir. 1973).

[82] Massie v. Henry, 455 F.2d 779 (4th Cir. 1972).

[83] Morrison v. Roberts, 82 P.2d 1023 (Okla. 1938).

The controversy continues. In six of thirteen cases decided on this point in the last ten years, the court found no constitutional right to participate in extracurricular activities,[84] and in one case it declined to rule on the issue, finding that the student had received due process whether or not it was his right.[85] In the other six cases it found that the right is significant, and a student must have due process before he can be deprived of the right.[86] In one of these cases—which arose from a televised brawl between University of Minnesota and Ohio State basketball players—the judge said, "This Court takes judicial notice of the fact that, to many, the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education."[87] He held that the players suspended by the conference association deserved a hearing, including at least two days' preparation time, notice of the charges, a list of opposing witnesses, the right to hear the testimony and to speak on their own behalf, written findings and an explanation of them from the hearing body, and preservation of a record on which to appeal.

Until quite recently, no North Carolina court (nor the Fourth Circuit Court of Appeals) had considered the question directly. But now some guidance is available from a Guilford County case.[88] A junior high student who attended a school athletic function was accused of stealing a spectator's wallet. After a rather careful investigation, which included talking with the boy and his father, the principal suspended the student from school for ten days and barred him from all after-school activities for the remainder of the year (about four months). The student sued, charging that suspension for these lengths of time without a school board hearing violated his right to due process. Since it was clear that the principal's investigation satisfied due process requirements for a short (10 days or fewer) suspension, the question for the court was whether the suspension from extracurriculars required additional due process. Noting that the matter had never before been decided in this state, the federal district judge held that a student had "no separate property interest" in extracurriculars. He did state, however, that extracurricular activities are part of the total educational process, so that under some circumstances, exclusion from all outside activities for a lengthy period might require due process. In this instance, the court fully approved the principal's actions, finding that more due process had been granted the plaintiff than was legally required.

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[84] Mitchell v. Louisiana High Sch. Ath. Association, 430 F.2d 1155 (5th Cir. 1970); Parish v. National Colleg. Ath. Association, 506 F.2d 1028 (5th Cir. 1975); Dallam v. Cumberland Valley Sch. District, 391 F. Supp. 358 (M.D. Pa. 1975); Albach v. Odle, 531 F.2d 983 (10th Cir. 1976); Hamilton v. Tennessee Secondary Sch. Ath. Association, 552 F.2d 681 (6th Cir. 1976); Florida High Sch. Activities Association v. Bradshaw, 369 So.2d 398 (Fla. App. 1979).

[85] Davis v. Central Dauphin Sch. Dist. Sch. Board, 466 F. Supp. 1259 (M.D. Pa. 1979).

[86] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville, 293 F. Supp. 485 (M.D. Tenn. 1968); Behagen v. Intercolleg. Conf. of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972); Lee v. Florida High Sch. Activities Association, 291 So.2d 636 (Fla. App. 1974); Robin v. New York State Public High Sch. Athletic Association, 420 N.Y.S.2d 394 (App. Div. 1979); French v. Cornwell, 276 N.W.2d 216 (Neb. 1979); Gulf South Conference v. Boyd, 369 So.2d 553 (Ala. 1979)—this court held participation to be a property right of "present economic value" for college athletes like the plaintiff but indicated that it would find to the contrary for high school athletes.

[87] Behagen v. Intercolleg. Conf. of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972).

[88] Pegram v. Nelson, 469 F. Supp. 1134 (M.D.N.C. 1979).

To summarize, from the legal standpoint exclusion from extracurricular activities is among the safest disciplinary methods available to the principal. If the student deserves discipline at all, it is proper to use this means of punishment. In extraordinary circumstances, when school officials can foresee that a student's loss will be severe, he should be offered the opportunity for formal disciplinary procedures. Although the single North Carolina case indicates that only minimal due process is necessary even then, it is best to tailor the amount of due process to the circumstances. For example, in the case of an outstanding high school athlete with scholarship prospects, the wisest course, in my judgment, would be to afford the player the same due process given for long-term suspension before excluding him from sports for a long period.

Searching Students and Their Property

The Fourth Amendment to the United States Constitution forbids "unreasonable" searches and seizures of persons and their belongings.[89] Beginning in 1921 with a United States Supreme Court decision that the amendment applies only to the acts of government officials (a category that includes school personnel),[90] the courts have interpreted the amendment often enough to produce a considerable body of law defining Fourth Amendment rights. In general, they have held that the amendment protects minors as well as it does adults in their dealings with the police but there is a lesser degree of protection for students in their relationship to school officials. While most courts hold that school officials are capable of violating students' Fourth Amendment rights,[91] they also hold, typically, that the standard for a reasonable search—that is, one that does not violate the Fourth Amendment—is easier to meet in the school context.[92]

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[89] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

[90] Burdeau v. McDowell, 256 U.S. 465 (1921).

Searches are reasonable in a number of circumstances that occur in schools. For example, a principal might (rarely) need to disarm someone who presents an immediate danger. In a recent case of this kind, the court held that grabbing a student's hand and removing the hand holding a gun from his pocket did not constitute "search and seizure" within the legal meaning of the phrase.[93] School officials in such situations are simply acting in their own defense and the defense of other students—Fourth Amendment rights are not at issue.

Aside from such unusual incidents, which are not true searches, principals may want to conduct searches for health and safety purposes. These are valid purposes and may form the basis for a legal search. The principal's authority to administer the school and his duty to protect the health and safety of students and employees is enough to justify many searches.[94] In North Carolina, for instance, the principal is obliged by statute to prevent property damage and fire hazards.[95] Carrying out these legal duties may well require periodic inspection of students' desks, lockers, and recreation areas. Though students understandably dislike inspections and some have litigated the issue, the principal will probably win a legal challenge to such inspections or searches. Courts generally agree that lockers, for example, may be inspected without violating the Fourth Amendment, either because they are school property or, even if they are viewed as student property, because the student has no reason to expect that he will be allowed to keep the locker private.[96] The Fourth Amendment protects only areas in which the owner has a reasonable expectation of privacy. On this point, then, principals would do well to remind students at the beginning of each year that lockers or other named areas are school property, subject to inspection at any time by school personnel. The principal should retain master keys to lockers and inform students that he has such keys.

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[91] A minority of courts, however, hold that the Fourth Amendment does not apply to students because school officials are not governmental agents when they act in loco parentis—that is, in the place of parents. Mercer v. State, 450 S.W.2d 715 (Tex. App. 1970); *In re* G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970); People v. Stewart, 313 N.Y.S.2d 253 (1970); Commonwealth v. Dingfelt, 323 A.2d 145 (Pa. App. 1974); State v. Kappes, 550 P.2d 121 (Ariz. App. 1976).

[92] As examples of the majority position, *see* State v. Baccino, 282 A.2d 869 (Del. Super. 1971); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. Div. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); State v. Young, 216 S.E.2d 586 (Ga. 1975).

[93] In the Matter of Ronald B., 401 N.Y.S.2d 544 (N.Y. App. 1978).

[94] Overton v. New York, 229 N.E.2d 596, *vacated and remanded*, 393 U.S. 85 (1968), *original judgment affirmed*, 249 N.E.2d 366 (1969). For a later development in same case, *see* Overton v. Riger, 311 F. Supp. 1035, *cert. denied*, 401 U.S. 1003 (1971).

[95] N.C. Gen. Stat. §§ 115-133, -149, -150, -150.1, -150.2 (1978).

[96] *In re* Donaldson, 75 Cal. Rptr. 220 (1969); State v. Stein, 456 P.2d 1 (Kan. 1969) *cert. denied*, 397 U.S. 947 (1970); Overton v. Rieger, 311 F. Supp. 1035, cert. denied, 401 U.S. 1003 (N.Y. 1971).

Other valid purposes for searching are to uncover violations of school rules or criminal laws.[97] No suspicion is needed to justify inspections for health and safety, but when a principal conducts a search to determine whether students are breaking the rules or the law, he must have at least a reasonable suspicion that they are doing so. "Reasonable suspicion" is an easier standard to meet than the "probable cause" that police need to justify a search. Probable cause "can be said to exist when the known facts lead a reasonable man to believe it is more likely than not that the object of the search will be found in the place to be searched. Probable cause is more than suspicion but falls short of proof beyond a doubt."[98] A few courts require that school authorities, like the police, must have probable cause to believe that they will find evidence of a crime or an illegal substance in a particular place before they search.[99] The majority, however, require only that school personnel reasonably suspect that school rules or laws are being violated and that evidence of it will be found in a search.[100] North Carolina principals are fairly safe in searching a student on reasonable suspicion, though they lack probable cause, because courts with jurisdiction over the state have not yet decided which standard applies here. While in 1975 the federal district court in eastern North Carolina forbade searches "without probable cause" except in emergencies, that order is probably not sufficient to establish the standard even for the eastern district. There is no written opinion in the case, only the brief order;[101] the opposing attorneys disagree on the meaning of the judge's oral statements,[102] and in any event the search that was the basis of the litigation was a search conducted without even reasonable suspicion, much less probable cause. For those reasons, it seems unlikely that the case forecloses the use of the reasonable-suspicion standard in North Carolina.

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[97] Only one court has held that school officials should search for school purposes only, leaving enforcement of criminal law to the police. Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976).

[98] Douglas Gill and Michael Crowell, *Laws of Arrest, Search, and Investigation in North Carolina*, 4th ed. (Chapel Hill, N.C.: Institute of Government, 1978), p. 49.

[99] Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975); State v. Mora, 307 So.2d 317 (La. 1975), *vacated and remanded*, 423 U.S. 809 (1975), *original judgment affirmed*, 330 So.2d 900 (1975).

[100] *See, for example*, State v. McKinnon, 558 P.2d 781 (Wash. 1977); *In re* John Doe VIII v. New Mexico, 540 P.2d 827 (N.M. App. 1975); Nelson v. Florida, 319 So.2d 154 (Fla. App. 1975); *In re* G.C., 121 N.J. Super. 108, 296 A.2d 102 (1972); State v. Baccino, 282 A.2d 869 (Del. Super. 1971); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. Div. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

[101] Wuske v. Batchelor, #75-0016-Civ-7 (E.D.N.C. July 18, 1975). Most of the students (160 of them) at Topsail High School in Pender County were searched, room by room, with no focus on individuals.

[102] James Wall, attorney for the plaintiffs, apparently did understand the judge to be requiring probable cause for future searches, as the later order stated. *Wilmington Morning Star*, July 16, 1975. But the school board's attorney does not believe that Judge Dalton intended his order to discriminate between school searches based on probable cause and those based on reasonable suspicion. Conversation with Richard V. Biberstein, Jr., July 19, 1979.

What is "reasonable suspicion," which is the minimum for searches to uncover wrongdoing? The answer depends on the circumstances of each incident. No general answer is satisfactory, but examples may be helpful. In one case the police chief telephoned the principal to report that particular students would be carrying drugs that day, even describing which of the boys' pockets the drugs would be located in.[103] In another, a school official saw a junior high school student smoking a pipe as he walked between classes, questioned the boy, and confiscated the pipe and drugs.[104] Search and seizure in these situations was found to be based on reasonable suspicion. But in a third case, a teacher's suspicion was not considered sufficiently well-founded to justify the search. It was based on information from months earlier that the student might be a drug dealer, on the fact that the student had once been observed eating lunch in the school cafeteria with another suspected drug-seller, and that on the morning of the search he was twice seen going into the bathroom with another student and coming out a short time later.[105] In another case a teacher discovered the plaintiff alone in a classroom during a fire drill. The student refused to identify herself but admitted that she was taking posters from the walls to furnish her sister's room. When the teacher searched for identification in a book bag near the plaintiff, the girl first claimed the bag as her own but then admitted it was not hers once it was claimed by a student who re-entered the room. No student reported anything missing. Being told of these facts, a second teacher had the plaintiff searched, giving as reasons the fact that plaintiff had stolen on earlier occasions and had had the chance to do so here. The court held that the search was undertaken without reasonable suspicion in violation of plaintiff's Fourth Amendment rights and that the two teachers involved were liable.[106]

One point is clear. Suspicion can be reasonable only when it is focused on one or a very few students. Occasionally a principal searches large groups—perhaps the entire student body[107] or a whole class[108] on the assumption that he will find culprits somewhere in the group. Such a principal runs a very substantial risk that his suspicion is unreasonable as to each one of the students searched and that the searches are therefore unconstitutional. If so, the principal can be held civilly liable.

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[103] State v. McKinnon, 558 P.2d 781 (Wash. 1977).

[104] *In re* John Doe VIII v. New Mexico, 540 P.2d 827 (N.M. App. 1975).

[105] People v. D., 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974).

[106] M.M. v. Anker, 477 F. Supp. 837 (E.D.N.Y. 1979).

[107] As in the Pender County case, Wuske v. Batchelor, #75-0016-Civ-7 (E.D.N.C., July 18, 1975).

[108] All eighth- and ninth-grade boys at Carnage Junior High School in Raleigh were searched in 1977. Raleigh *News and Observer*, March 26, 1979, p. 1. Apparently no litigation resulted. In Bellnier v. Lund, C.A. No. 75-CV-237 (N.D.N.Y. 1977) [summarized in *Education Law Bulletin* 10 (November 1977), 544], a class of fifth-graders was ordered to strip to their underclothes in an attempt to recover missing money; the court found the search unreasonable because no student or students were the focus of suspicion. Another court upheld the fingerprinting of all boys in an eighth-grade class, but in that case the severity of the crime (murder) and the circumstances (class ring found near victim, his car with strange fingerprints on steering wheel abandoned in the town where the school was located) no doubt compensated for the lack of focus of suspicion. *In re* Fingerprinting of M.B., et al., 309 A.2d 3 (N.J. App. 1973).

In judging the reasonableness of the search, courts are likely to balance the interests of the school and the student. In an early case involving a college student, the court expressed this balancing of interests: "The constitutional boundary line between the right of the school authorities to search and the right of a dormitory student to privacy must be based on a reasonable belief on the part of the college authorities that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline."[109] The same principle applies in public schools. What steps are reasonable depends in large measure on how serious the threat is to the school, how strong the suspicion is against a student, and how intrusive a search would be. When the search is a severe invasion of the student's privacy, the principal must have strong reasons to justify it. For example, in the few cases involving strip searches of students, the decisions have favored the students. In one, eight junior high school girls were ordered to remove their clothing and were searched in an unsuccessful attempt to find a classmate's ring.[110] In another, the principal ordered a 13-year-old girl searched for drugs by female school employees under the direction of the police. The girl alleged that she was made to remove clothing.[111] An entire fifth-grade class was forced to remove all but underwear and searched for a missing $3.[112] In another case, a 15-year-old girl who was forced to take her clothes off by male and female school officials searching for drugs is said to have been awarded $7,500 in damages.[113] Most recently, a federal court in Indiana prohibited strip searches of students for drugs on the basis of dog alerts, though the court upheld the use of dogs and the search of students' pockets, purses, and clothes.[114] These decisions indicate that the principal should proceed cautiously in deciding to search a student's person, especially if clothing will be removed in the search. The threat to school discipline or the suspected violation of law should be serious and the principal's suspicion of the particular student should be strong. Obviously, a search of a student's coat or jacket, purse, car, or locker is somewhat less intrusive than a search of his person, though the student does have a reasonable expectation of privacy in all but his locker.

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[109] Moore v. Student Affairs Commission, 284 F. Supp. 725, 730 (M.D. Ala. 1968).

[110] Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973).

[111] Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976).

[112] Bellnier v. Lund, C.A. No. 75-CV-237 (N.D.N.Y. 1977) [summarized in *Education Law Bulletin* 10 (November 1977), 554].

[113] Judgment reported, without citation, in *Nolpe Notes* 14, no. 7 (1979), 3.

[114] Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979).

Any person may consent to a search and, if his consent is truly voluntary, it is considered a waiver of his constitutional rights. In that case the search is legal, even if it would not otherwise have been. Suppose the student agrees to the search or hands over damaging evidence after the principal threatens to search him. Is his consent voluntary? Possibly, but it would be unwise to rely on consent to validate an otherwise unconstitutional search of a student. For example, if the principal tells the student that he will be searched unless he empties his pockets and the student does so, no court will treat his behavior as consent. On the contrary, the legality of the episode will be judged as if the principal himself had searched the student.[115] If there is no direct coercion, the legal question is closer. Still, courts have consistently refused to find that college students consented to a search of their dormitory room, although they signed a contract that contained a warning of possible searches[116] and did not resist school personnel's entrance into the room.[117] Presumably, a court would be even more reluctant to find that a person of less than college age had knowingly, voluntarily waived his rights. For a young person, simply being told to do something by the principal may be coercive enough to eliminate the possibility of valid consent on the student's part.

School authorities and the police often cooperate in searching students. When they do so, the legal situation is changed. The important point to remember is that police involvement in a search usually calls forth the higher, probable cause standard discussed above.[118] Any contact by the school administration with police before the search is over may be enough to make it a police search, but courts vary widely on this point. The crucial factor in a number of cases has been whether the police caused the search. The courts in some cases in which a school official independently decided to search has found that his search is not a police search even though the police provided information on which the official's suspicion was based,[119] actually conducted the search,[120] or were called in for advice on identification and disposal of the goods seized.[121] In one recent case the court concluded that the determinative issue was the purpose of the search. Because school officials and the police had agreed beforehand that no criminal prosecutions would be undertaken as a result of the search, the court held the search to be a school search, for which probable cause was not needed, even though the police participated in it.[122]

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[115] Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970); Ranniger v. State, 460 S.W.2d 181 (Tex. App. 1970); *In re* G.C., 121 N.J. Super. 108, 296 A.2d 102 (1972); Nelson v. Florida, 319 So.2d 154 (Fla. App. 1975); *In re* John Doe VIII v. New Mexico, 540 P.2d 827 (N.M. App. 1975).

[116] Moore v. Student Affairs Commission of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968); People v. Cohen, 57 Misc. 366, 292 N.Y.S.2d 706 (1968); State v. Stein, 203 Kan. 638, 456 P.2d 1 (Kan. 1969), *cert. denied*, 397 U.S. 947 (1970); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970); Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971); Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).

[117] Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976).

[118] Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973); Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976). The view expressed in *In re* Fred C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972)—that police need not have probable cause if they are searching at the school's request—is unusual.

[119] People v. Boettner, 80 Misc. 2d 3, 362 N.Y.S.2d 365 (1974); State v. McKinnon, 558 P.2d 781 (Wash. 1977).

[120] *In re* Fred C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972); Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976). *Picha* holds that the police did cause the search.

A second issue is whether the police can conduct a legal search on the basis of the school's (not the student's) consent. Two cases approve this form of consent because the school stands in the place of the parent, who could presumably consent for a minor child.[123] Others conclude, however, that the student alone can consent.[124] After reviewing the cases, a principal may think that he has a better chance to avoid searching illegally if he does not seek the help of law enforcement officers. But he should not forget that school-police cooperation is highly desirable in dealing with ongoing criminal activities such as drug traffic. In such cases, school authorities would want to report their suspicions to police so that they can begin investigations aimed at accumulating evidence for successful prosecution.

What uses can be made of evidence uncovered in a search? If the search was valid, the principal may use its results in school disciplinary actions. He may also, if he wishes, turn the evidence over to the police for use in a criminal prosecution. If the search was illegal, legal opinion is divided on whether evidence taken in it must be excluded from school[125] or criminal proceedings.[126] Conducting an illegal search may, of course, produce other consequences besides the inadmissibility of evidence from it. Though rarely, school personnel have been sued for damages,[127] and injunctions demanding a student's reinstatement[128] or preventing future searches have been sought.[129]

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[121] People v. Lanthier, 97 Cal. Rptr. 297, 488 P.2d 625 (1971); State v. Lamb, 137 Ga. App. 437, 224 S.E.2d 51 (1976).

[122] Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979).

[123] State v. Stein, 203 Kan. 638, 456 P.2d 1 (Kan. 1969), *cert. denied*, 397 U.S. 947 (1970); Overton v. New York, 229 N.E.2d 596, *vacated and remanded*, 393 U.S. 85 (1968), *original judgment aff'd*, 249 N.E.2d 366 (1969), same facts as Overton v. Rieger, 311 F. Supp. 1035, *cert. denied*, 401 U.S. 1003 (1971).

[124] Moore v. Student Affairs Comm'n of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970); Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

[125] The exclusionary rule is inapplicable to school disciplinary proceedings—Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976); exclusionary rule applicable—Moore v. Student Affairs Comm'n, 284 F. Supp. 725 (M.D. Ala. 1968), Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).

[126] Most school search cases that arise involve a student's challenge to his conviction that is based on evidence found in an allegedly unconstitutional search. Nearly all decisions state or assume that if the search is invalid, the conviction must be overturned. Two cases, however, state that the exclusionary rule does not apply to school searches: evidence obtained illegally is admissible in court. State v. Young, 216 S.E.2d 586 (Ga. 1975); State v. Lamb, 224 S.E.2d 51 (Ga. App. 1976).

Working with Police

The relationship between school officials and law enforcement authorities raises certain problems. One school law text sums up the principal's quandary this way:

> The enigmatic nature of the *in loco parentis* relationship comes into sharp focus when police visit the school and ask the assistance of the school personnel in the questioning or search of the person or effects of a student. Should school personnel protect the student, respecting his right to privacy and the privilege against self-incrimination, or is their loyalty to the societal interest in the detection of crime and the protection of the mass of the student body from danger?[130]

What are the principal's choices when the police come to school to talk with a student or to arrest him? In the latter case, when the officers announce that they are there to take a student into custody,[131] the principal has no choice but to send for the student or take the officers to him without delay.

But when the police officers simply want to question the student, without taking him into custody, the principal may refuse their request. He is under no legal obligation to allow police to talk with a student and may be under an obligation to protect the student by refusing to allow questioning. But suppose that he wants to cooperate with police by allowing them to interrogate a student. May he do so without violating the student's legal rights? That question cannot be answered definitely at this time, but the following discussion offers a tentative conclusion.

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[127] Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973); Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976); damages of $7,500 were apparently awarded in a case reported in *Nolpe Notes* 14, no. 7 (1979), 3; M.M. v. Anker, 477 F. Supp. 837 (E.D.N.Y. 1979).

[128] Keene v. Rodgers, 316 F. Supp. 217 (D. Me. 1970); Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975); Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976).

[129] Bellnier v. Lund, C.A. No. 75-CV-237 (N.D.N.Y. 1977); Wuske v. Batchelor, #75-0016-Civ-7 (E.D.N.C., July 18, 1975).

[130] M. Chester Nolte, *Guide to School Law* (West Nyack, N.Y.: Parker Publishing Co., 1969), p. 74.

[131] The law enforcement officers may have a court order or they may be exercising their authority under G.S. 7A-571 (1979 Supp.) to take juveniles (for most purposes, this means persons under 18) into temporary custody without a court order in these situations: (1) when grounds exist to arrest an adult under identical circumstances; (2) When there are reasonable grounds to believe that the child (if under 16) is undisciplined (runaway, truant, beyond parental control); (3) when there are reasonable grounds to believe that he is abused, neglected, or dependent and would be injured or could not be taken into custody if it were necessary to obtain a court order; and (4) when there are reasonable grounds to believe that he has run away from a state training school or detention facility.

Decisions of both the United States Supreme Court[132] and the North Carolina Court of Appeals[133] have held that children who are objects of criminal prosecution enjoy the same Fifth Amendment protection against self-incrimination as adults. Moreover, the newly enacted juvenile code of North Carolina (General Statutes Chapter 7A, Articles 41 through 57) grants other important rights. It is clear under the code that warnings and other protection must be afforded children who are in custody.

What will often not be clear, however, is whether a child brought to the principal's office to be questioned in the presence of the principal and the police is "in custody." If he *is* in custody, G.S. 7A-595 governs:

> § 7A-595. *Interrogation procedures.*—
>
> (a) Any juvenile in custody must be advised prior to questioning:
>
> (1) that he has a right to remain silent; and
>
> (2) that any statement he does make can be and may be used against him; and
>
> (3) that he has a right to have a parent, guardian or custodian present during questioning; and
>
> (4) that he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.
>
> (b) When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (1); however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.
>
> (c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that he does not wish to be questioned further, the officer shall cease questioning.
>
> (d) Before admitting any statement resulting from custodial interrogation into evidence, the judge must find that the juvenile knowingly, willingly, and understandingly waived his rights.

Subsection (a) is straightforward. It states that a juvenile[134] who is at least 14 but not yet 18 must be told of four rights before questions are asked. After he is given this information, if he "knowingly, willingly, and understandingly" waives the rights by incriminating himself, his confession or admission can be used against him. Subsection (2) deals with the very young person, the child under 14. No confession or admission by a person of that age may be used against him unless it was made in the presence of his parent, guardian, custodian, or attorney. Although it might seem at first that the principal would qualify as "parent," "guardian," or "custodian," the code's definition section[135] indicates otherwise. "Custodian" is defined as "the person or agency that has been awarded legal custody of a juvenile by a court." Obviously, a public school principal does not fit the definition. "Parent" and "guardian" are not defined, but principals and other school officials seem to fall more naturally under the heading of "caretaker," which the statute defines as "any person, other than a parent, who is acting *in loco parentis* to a juvenile . . . ." Since caretakers are not among the categories of persons named in G.S. 7A-595(b), one concludes that the presence of the principal will not change the fact that no statements made by a student in custody who is under 14 can be used against him if not made voluntarily and in the presence of his parent, guardian, custodian, or lawyer.

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[132] *In re* Gault, 387 U.S. 1 (1967).

[133] *In re* Arthur, 27 N.C. App. 227 (1975).

[134] "Juvenile" is defined, in part, as "any person who has not reached his 18th birthday and is not married, emancipated, or a member of the armed services of the United States." N.C. GEN. STAT. § 7A-517(20) (1979 Supp.).

If the student is not in custody, neither the Fifth Amendment warning nor the statutory warnings and safeguards are necessary. But so far no court decisions have described the circumstances under which interrogation in the school setting is sufficiently coercive to amount to custody. Only future cases can determine whether it can ever be said that a child answered voluntarily when questioned by police at school. In my opinion, admissions made in that situation could rarely be seen as voluntary when one considers the student's age, the fact that he is not free to leave school, and the possibility of school sanctions for disobeying the principal's implied or explicit orders to cooperate. If this view is accepted, every child questioned at school must have the protection of G.S. 7A-595 and the Fifth Amendment.

One final point to note is that when a school employee alone interrogates a student for the purpose of gaining evidence for criminal prosecution, the employee acts under some of the same legal restraints as the police. The point is made by a 1970 North Carolina case in which a school employee called at the house of an eight-year-old student to question him about an incident of serious property damage at school. The child's parents were not present and he was not told that he could refuse to talk. The child confessed to having caused the damage, was tried and convicted, and committed to training school. On appeal, the court set aside the conviction, which had rested entirely on the confession. It held that the child, like an adult, deserved the protection of the Fifth Amendment. That protection was not given in this instance, and so the child's confession was not voluntarily made and thus was inadmissible.[136] See Chapter 2, "Protecting Students from Themselves," for a further discussion on this matter.

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[135] *Id.* § 7A-517 (1979 Supp.).

[136] *In re* Ingram, 8 N.C. App. 266 (1970).

Chapter 4

THE PRINCIPAL AS SUPERVISOR

Many of a principal's duties derive from his role as manager, in which he supervises a variety of workers. For convenience, this chapter divides school employees into two groups: those who hold a certificate from the state, hereafter called professional employees, and those who do not, called nonprofessional employees. Though there is some overlap, the principal's obligations to the two groups are somewhat different.

Hiring

All personnel, professional and nonprofessional, are hired by the board of education.[1] Although a principal, a personnel supervisor, and the superintendent often interview applicants and offer recommendations concerning them, no one but the board has the legal authority to make employment contracts.[2] The principal should keep this fact clearly in mind when talking to applicants or filling positions temporarily until the board can act. In the latter case, the principal acts properly and within his authority in filling a vacancy so long as both he and the person he employs understand that no valid contract exists until the board has acted.[3]

School units enter into written contracts with their professional employees. The contract forms are provided by the state and are of two kinds: one for those in an initial, probationary period and another for those with career status or tenure. The probationary contract is for only one year, at the end of which the contract may be renewed or not, whereas the career employee's contract contains no time limit. Neither contract states the terms of compensation, benefits, or other basic conditions. These are set out in the State Board's salary schedule, which—along with any local salary supplement—is discussed with applicants. The written contract merely states that the "professional services" of the employee have been retained and that "assignments to duties will be made by the superintendent of schools." Thus the board does not contract with its employees for particular posts, and it may assign and reassign them as need arises. Teachers, for instance, may be assigned to teach different subjects or grades or to teach at different schools from time to time, although the school unit's accreditation may suffer if many teachers are assigned to teach in areas in which they are not certified.[4]

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[1] N.C. GEN. STAT. §§ 115-21, -58 (1978); Johnson v. Gray, 263 N.C. 507, 139 S.E.2d 551 (1965).

[2] The board is obliged to solicit and listen to a recommendation from the superintendent but need not accept it. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 181 (1975).

[3] In some units, particularly the larger ones, the board authorizes the superintendent to hire nonprofessional employees on an interim basis and seek board approval at regular intervals. That procedure cannot, legally, be followed for professional employees since their contracts are not valid until approved by the board.

Neither the statutes nor State Board of Education regulations require written contracts for nonprofessional employees, and it has not been customary in North Carolina to have them. The North Carolina Supreme Court holds that employees, once hired, have no right to expect to keep their jobs—no implied contracts, that is, no matter how long they work. The employment relationship can be ended at any time by either the employee or the board with no further obligation in most instances.[5] But, although they need not do so, some boards may prefer to bind both themselves and their employees at least for the duration of the school year. This can best be accomplished by a written contract between the board and each employee naming the term and other conditions of employment.

Dismissal

Dismissal, like hiring, is solely the prerogative of the board of education. But the principal is very likely, even more than in hiring, to have an influential role in a dismissal decision. For a probationary professional employee, the superintendent must recommend to the board each year either that the contract be renewed for another year or be allowed to terminate. His recommendation will necessarily rely on the principal's evaluations. Likewise, when the superintendent recommends dismissal of a tenured employee, the recommendations must be supported by the principal's written evaluations; otherwise dismissal is unlikely to occur.

Dismissal of professional employees is regulated by the state's Tenure Act, G.S. 115-142, but what is required for dismissal of a nonprofessional employee is a matter of the individual's contract (contracts for nonprofessionals are rare, as noted above) or of constitutional law. Usually, for nonprofessional employees, there will be no legal requirements to be met. The North Carolina Supreme Court has held that a public employee in the state has no legal right to employment unless his employer, by statute or contract, has given him some sort of guarantee.[6] The United States Supreme Court reached the same conclusion in *Bishop v. Wood*,[7] which arose in Marion, North Carolina. That case concerned a policeman who was fired by the city manager, acting on the police chief's recommendation. For several reasons, the employee claimed a constitutional right to a hearing: First, the city ordinance listed several grounds for which permanent employees could be dismissed. The plaintiff claimed (a) that the listed grounds were the only permissible bases for dismissal and the reasons given for his dismissal were not among the permissible grounds, and (b) that he must be given a hearing so that he could prove that the stated reasons were not true in his case. Second, he claimed that his classification by the city as a "permanent" employee gave him a property interest in his job. Third, he said that the damage to his reputation caused by the city's false allegations violated his liberty. Since the Fourteenth Amendment to the United States Constitution forbids deprivation of property or liberty without due process of law, the policeman claimed that the Constitution entitled him to a pretermination hearing. The Supreme Court disagreed. It noted that North Carolina law gives no public employee a right to continued employment in the absence of statute or contract. The plaintiff was not protected by statute (as professional school employees are by the Tenure Act), and the Court refused to find that the city had offered him a contract (though the plaintiff argued—plausibly, in my opinion—that the city's use of the term "permanent employee" and the ordinance stating reasons for discharge of permanent employees constituted an implied contract). Thus the Court dismissed the property interest claim. As for liberty, the Court concluded that the plaintiff's liberty interest in reputation had not suffered, since the city did not make public its reasons for the firing. The reasons were revealed only to the plaintiff himself and therefore, false or not, could not have injured his standing in the community.

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[4] 16 N.C.A.C. 2H.0200(d) (1977).

[5] Presnell v. Pell, 298 N.C. 715 (1979).

[6] Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); Presnell v. Pell, 298 N.C. 715 (1979).

[7] 426 U.S. 341 (1976).

The issue of damage to a dismissed nonprofessional employee's reputation arose again recently in North Carolina. The case of *Presnell v. Pell*[8] should interest every principal. The plaintiff, Mrs. Presnell, had been employed by the Surry County Board of Education for eighteen years, fourteen of them as cafeteria manager. The principal of the school where she was employed accused her of bringing liquor to school and distributing it to painters who were working in the cafeteria. She alleged that, despite her denials, the principal "maliciously and in bad faith" brought the charges to the district school committee, which dismissed her as a result, and that he publicized the charges to her fellow workers. Because the circumstances of the dismissal damaged her reputation, Mrs. Presnell asserted a constitutional right to a pretermination hearing (which she had not had) and sought damages for violation of the right. She also sued the principal, individually, for slander. The North Carolina Court of Appeals concluded that the law would support her if she could prove her facts.[9] The court stated that, even assuming her employment could be ended whenever the board wished under ordinary circumstances, in circumstances in which her reputation was at stake, the Fourteenth Amendment's protection of liberty did entitle her to a hearing and a fair decision. The court also held that the principal was not protected against an action for slander if he reported the charges even to his superiors out of malice—that is, acting in bad faith. Moreover, since duty did not require him to report the plaintiff's alleged misbehavior to her fellow employees, that action was not "privileged" or protected. The North Carolina Supreme Court agreed for the most part.[10] It held that Mrs. Presnell's reputation was sufficiently protected by statute, G.S. 115-34, which allows actions taken by school personnel to be appealed to the board of education. Furthermore, the Court said, the board hearing need not have been held before the dismissal; holding it within a reasonable time afterward was soon enough. Consequently, the Court found that the plaintiff should have first sought a school board hearing—and it dismissed her complaint against the board and its members because she had not.

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[8] 298 N.C. 715 (1979).

It did not, however, dismiss the part of her complaint charging the principal with defamation of character. Instead, the case was sent back for trial to determine whether her claim in this regard was true. The claim was that, despite her denials, the principal "falsely and maliciously" spread the story of her supposed misconduct to her fellow workers. The principal asserted the defense of "conditional privilege," an important concept for principals to understand. Conditional privilege is the right of a person charged with a responsibility to share information with certain persons with whom he must communicate if he is to do the job properly, even though the information is defamatory. For conditional privilege to exist (1) the communication must be made in good faith—i.e., the speaker must have reason to think the information true; (2) the information must concern a matter in regard to which the speaker has a legal right or duty; and (3) the communication must be made to someone who has a corresponding right or duty. On this last point, the court found that the principal's claim of privilege failed because he did not allege or prove the need for telling the plaintiff's coworkers about the incident.

The conclusion to be drawn from the cases is this: nonprofessional employees ordinarily have no expectation of continued employment—that is, no legally enforceable property interest in their jobs. As the U.S. Supreme Court said of the Marion policeman, he "held his position at the will and pleasure of the city."[11] However, public employees do have a

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[9] Presnell v. Pell, 39 N.C. App. 538, 251 S.E.2d 692 (1979).

[10] 298 N.C. 715 (1979).

[11] Bishop v. Wood, 426 U.S. 341, 345 (1976).

"liberty interest" in preserving their good names that protects them from being unfairly terminated in a situation in which the reasons for dismissal are made public and are damaging to reputation. This is not to say that employees charged with misconduct cannot be dismissed. The critical requirements in such a dismissal are that the board grant a hearing, if requested, either before or soon after it decides to dismiss, and that the principal present his charges in as fair a manner as possible to those persons who have an official responsibility to act but to no one else. Usually this will include the superintendent, the board members, and perhaps the board attorney. It may include others as well. A principal should be careful not to speak poorly of one employee to other employees or indeed to anyone except those whom he has a duty to inform.

Assignment of Duties and Supervision

The school board, following the superintendent's advice usually, assigns employees to schools and sets the major outline of their duties. Thereafter, the principal, as the school's executive head,[12] exercises considerable authority. He has the authority to enforce the unit's rules (or even to make rules if the unit as a whole has none) on such matters as leave, vacation, tardiness, and student discipline. He is expected to formulate reasonable policies on a wide variety of topics in order to make the school function smoothly and is entitled to expect cooperation and compliance from all employees in that endeavor. The Tenure Act, G.S. 115-142, lists among the grounds for dismissal of professional personnel several that are pertinent here: insubordination, neglect of duty, and failure to comply with such reasonable requirements as the board may prescribe. Any one of these can be evidenced by refusal to cooperate with a principal's or superintendent's reasonable requests, as cases in other states indicate.[13] In a recent North Carolina case, a teacher's dismissal was upheld for refusal to comply with board policy on corporal punishment.[14] The same result would have been obtained, I believe, if the policy had been her principal's rather than the board's. While the principal may never contravene board policy, he may, unless the board says otherwise, prescribe specific rules to supplement or carry out the general policy. Moreover, in areas where the board has not acted, it may well be appropriate for the principal to establish rules applicable within his own school. An employee's refusal to comply with these rules could then become grounds for dismissal by the board.[15]

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[12] The principal is so defined in N.C. GEN. STAT. § 115-8 (1978).

[13] For example—Petitions of Davenport, 283 A.2d 452 (Vt. 1971), and Whitsel v. Southeast Local Sch. District, 484 F.2d 1222 (6th Cir. 1973)—teachers refused principals' orders to halt demonstrations and return to class; Board of Educ. of Ashland Sch. District v. Chattin, 376 S.W.2d 693 (Ky. App. 1964)—vocational director refused to complete financial forms as requested by superintendent; Peterkin v. Bd. of Education, 360 N.Y.S.2d 53 (1974)—teacher refused to explain being seen in public in apparent good health during sick leave; Ray v. Minneapolis Bd. of Education, 202 N.W.2d 375 (Minn. 1972)—teacher refused principal's and superintendent's request to complete forms needed for evaluating department; Gilbertson v. McAllister, 403 F. Supp. 1 (D. Conn. 1975)—teacher twice refused principal's order to report to his office.

[14] Kurtz v. Winston-Salem/Forsyth Bd. of Education, 39 N.C. App. 412, 250 S.E.2d 718 (1979).

What can the principal require in the way of extra duties that are not specifically named in an employee's contract? The law understands and completely accepts that school employees must share certain "housekeeping chores" not directly relevant to their professional assignment: collecting money; patrolling the halls and recreation areas; supervising bus-loading, play periods, and early arrivals—the list is almost endless, unfortunately. As long as the duties are reasonable[16] and the principal allocates them fairly among employees, he need not doubt his authority to make such assignments.

The same is true of the more onerous time-consuming assignments to supervise extracurricular activities. Not surprisingly, a number of teachers question the principal's authority here and occasionally try to refuse an assignment. Chaperoning out-of-school events, coaching, sponsoring student clubs, working with newspaper and yearbook staffs, putting on plays—these are substantial burdens. In states and districts where teachers are unionized, these items are almost always settled by union contract. But in the absence of union contract, as in this state, the law supports the school's right to impose these obligations. The courts view them as implicit in the teacher's contract, as long as they are reasonable and are distributed fairly among the faculty.[17]

The principal has authority inside the classroom as well. He not only may but ought to supervise teaching as closely as is necessary to insure good performance. The principal may direct his teachers' work in regard to both what is taught and how it is taught, but two limitations on his authority are worth noting. First, teachers, like other citizens, have rights of free speech guaranteed by the First Amendment. The United States Supreme Court referred to this fact in a significant 1969 decision, saying, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[18] A year earlier, in perhaps the most important case so far involving teachers' speech rights, the Court had upheld a teacher's right to criticize his superiors publicly.[19] Teachers sometimes express opinions[20] or assign material that may be offensive to administrators, parents, or students. In most instances they have a legal right to do so and can defeat the school administration's attempts at discipline or dismissal by arguing that their constitutional right to free speech is being denied.[21] In this area, then, the principal should remember that he may tell a teacher what subjects to cover—and even what methods to use in covering them—but not what opinions to express on those subjects. It is also possible that he may not tell a teacher not to mention particular subjects, though certain topics might possibly be placed off-limits for very young students, and some—notably sex—are prohibited in some other states by statute or school board policy.

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[15] Though at least one case has held that a teacher could disobey rules issued by the superintendent but not the board [Hovland v. Sch. Dist. No. 52, 278 P.2d 211 (Mont. 1954)], it seems sensible that a board could, though it need not, ratify an administrator's rules implicitly, after the fact, by dismissing for failure to comply with them.

[16] An example of the school's asking too much occurs in School Dist. No. 25 of Blaine County v. Bear, 233 P. 427 (Okla. 1925), in which the teacher was expected to do janitorial work. The court refused to find this to be an implied term of the contract.

[17] See, L. Peterson, R. Rossmiller, and M. Volz, *The Law and Public School Operation*, 2d ed. (New York: Harper and Row, 1978), § 17.9b, p. 429; and Irving C. Evers, "The Principal's Authority Over Assigned Personnel," in Ralph E. Stern (ed.), *The School Principal and the Law* (Topeka: National Organization for Legal Problems in Education, 1978), pp. 17-24.

[18] Tinker v. Des Moines Indep. Comm. Sch. District, 393 U.S. 503 (1969).

The second possible limitation on the principal's right to supervise teaching arises from the concern that close supervision of a teacher can become harassment. The legal issue may be raised when a board has decided to dismiss a tenured employee or not to renew the contract of a probationary professional employee. Occasionally, the employee charges, either in the board hearing or later in court, that the principal's or other administrator's attempts at supervision constituted harassment and that his negative recommendation on retention was due to personal malice, evidenced by the harassment. Certainly this could be true. If so, it is to be hoped that the board procedure or trial would reveal the bias and the employee would be retained. The bare fact that such charges are often made, however, should not discourage a conscientious principal from fulfilling his obligation to the school and to the employee himself when performance is inadequate. When a teacher (or other employee) does poorly, it is entirely appropriate for a principal to require even daily conferences, to make frequent classroom visits, to see lesson plans, or to employ other measures intended to produce improvement. Singling out a teacher for special attention of these kinds may well be helpful to the teacher and is not, in itself, proof of unfair discrimination.

It should be noted that the principal's right to supervise teaching is specifically granted by North Carolina statute. G.S. 115-150 states that the principal shall "give suggestions to teachers for the improvement of instruction. It shall be the duty of each teacher in a school to cooperate with the principal in every way possible to promote good teaching in the school . . . ." Again, by statute, the principal is one of those persons authorized to assign duties to student teachers.[22]

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[19] Pickering v. Bd. of Education, 391 U.S. 563 (1968). Here the plaintiff-teacher had written a letter to a newspaper criticizing the school board's athletic expenditures and accusing the board and superintendent of concealing facts from the taxpayers. In finding for the teacher, the Supreme Court advised "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

[20] Sterzing v. Fort Bend Indep. Sch. District, 376 F. Supp. 657 (S.D. Texas 1972); 496 F.2d 92 (5th Cir. 1974).

[21] Webb v. Lake Mills Comm. Sch. District, 344 F. Supp. 791 (N.D. Iowa 1972); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970); Harris v. Mechanicville Central Sch. District, 382 N.Y.S. 2d 251 (1976).

Evaluation

The principal's right and duty to supervise teaching implies a right and duty to evaluate and make recommendations about retaining faculty members and others. By July 1981 each administrative unit must have a written policy requiring annual evaluation of at least all professional employees, tenured and probationary.[23] (State statute does not yet require written or regular evaluation of all school employees.) If evaluations exist, they must be considered in "determining whether the professional performance of a career teacher is adequate."[24] If the principal has not made frank evaluations—preferably over a period of years—and carefully documented his conclusions, it will be extremely difficult for the superintendent and board to dismiss a teacher for inadequate performance. The principal's documented observations are usually the most important evidence of other grounds for dismissal too.[25] Principals should make written records of troublesome incidents or recurrent problems, recognizing the unfortunate possibility that they may be needed as evidence in future administrative or legal proceedings, although the major reason for evaluation is the nonlegal goal of improving teaching.

Personnel Records

The Tenure Act (G.S. 115-142) has several provisions on the rights of professional employees with respect to written records made about them. First, the law protects the employee from anonymous or secret criticism. Every "complaint, commendation, and suggestion" must be signed by the person who makes it (this includes the principal) and shown to the employee before it may be placed in his file. The employee must have at least five days' notice before any document is put in the file. This gives him an opportunity to inspect it, reflect on it, and if possible to deny or explain any derogatory material contained therein. If the document is placed in the file at the end of the waiting period, the employee retains the right to place his own statement about the matter in his file at any time.

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[22] N.C. GEN. STAT. § 115-160.7 (1978).

[23] Section 35 of the 1980 Supplemental State Budget (N.C. Sess. Laws 1980, Ch. 1137) directs the State Board of Education to develop standards to be used by local boards in annual evaluations of employees and directs local boards to begin evaluating teachers annually by July 1981.

[24] N.C. GEN. STAT. § 115-142(e)(3) (1978).

[25] Grounds for dismissal, set out in N.C. GEN. STAT. § 115-142(e)(1), are (a) inadequate performance; (b) immorality; (c) insubordination; (d) neglect of duty; (e) physical or mental incapacity; (f) habitual or excessive use of alcohol or nonmedical use of a controlled substance as defined in G.S. Ch. 90, Art. 5; (g) conviction of a felony or a crime involving moral turpitude; (h) advocating the overthrow of the government of the United States or of the State of North Carolina by force, violence, or other unlawful means; (i) failure to fulfill the duties and responsibilities imposed upon teachers by the General Statutes; (j) failure to comply with such reasonable requirements as the board may prescribe; (k) any cause that constitutes grounds for revoking a career teacher's teaching certificate; or (l) a justifiable decrease in the number of positions as a result of district reorganization or decreased enrollment, provided that subdivision (2) of the statute is complied with; (m) failure to maintain one's certificate in a current status; (n) failure to repay money owed to the State in accordance with the provisions of G.S. Ch. 143, Art. 60.

The superintendent is the custodian of personnel files, which must be kept in his office (though the principal may wish to keep copies of documents about his staff, particularly his own evaluations). The statute, read literally, seems to require that the superintendent add to the file every communication, positive or negative, received about an employee from any source. The weight of what legal opinion exists on this point, however, is that the superintendent may exercise some discretion. If he felt, for example, that a damaging letter from a parent was without foundation, he might be justified in excluding it. He would presumably be less justified in excluding a document (evaluation) submitted by a principal or other supervisor in the course of duty.[26]

Another effect of the law is to protect the employee's file from persons who have no legitimate interest in seeing it. Were it not for the statute [G.S. 115-142(b)], school personnel records, like all other governmental records, would be open to public inspection under the North Carolina Public Records Act.[27] As it is, the employee has access to his file "at all reasonable times," but all other persons have access only in accordance with rules and regulations adopted by the local board of education. Every unit should have such regulations. Their content and scope may vary, but the general principle underlying them will be a balance between the employee's right to privacy and the school system's need to have certain information about its employees in order to carry out its educational function. Certainly, the regulations should provide access for the board, the superintendent, and the principal. Others—such as school personnel who do not supervise the employee, creditors, prospective employers, or the police, for instance—should probably not be given access except with the employee's consent.[28]

Documents may be kept in an employee's file indefinitely, but there is a limit on the age of material that forms the grounds for a dismissal. With one exception, a dismissal cannot be based on evidence of conduct that occurred more than three years before the dismissal process is begun.[29] Until recently it was assumed that evidence more than three years old could not even be presented to the school board in a dismissal hearing. That assumption is called into question, however, by a decision of the state appeals court. In *Baxter v. Poe*,[30] the court refused to reverse a teacher's dismissal merely because the board heard older evidence. The court stated that admission of the evidence as background material was appropriate, so long as the dismissal was not based on it.

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[26] There is no court interpretation of the statute. The legal opinion referred to is that of the Attorney General's staff and two Institute of Government faculty members. The proposed revision of Chapter 115 by the Commission to Revise the Public School Law (House Bill 55, 1979 General Assembly) would have amended the statute to make it clear that the superintendent has discretion.

[27] N.C. GEN. STAT. § 132-1 (1979 Supp.) defines public records very broadly as "all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions."

[28] Joan G. Brannon, *Proposed School Board Regulations Governing Access and Maintenance of Teacher Personnel Records* (Chapel Hill, N.C.: Institute of Government, 1976).

Only one kind of document can legally be kept from the employee—information received about him before his employment. The board's regulations may specify that a separate file, not available to the employee, shall be maintained for pre-employment data. The advantage of doing so is the possibility of greater frankness from references who can be assured of confidentiality. The disadvantage is that information from the file cannot be used as evidence in a dismissal hearing.[31]

It cannot be stated with certainty what the effect would be of failing to notify an employee of information placed in his file, because there is no binding case law on the point. Recently, however, the California Supreme Court held that a school district could not demote an employee (in this case, a principal) who had not been shown several memos from the associate superintendent to the superintendent criticizing the principal's performance. The California statutory provision is similar to ours; it states that professional ("certificated") employees must have a chance to see and comment on derogatory information if it is to serve "as a basis for affecting the status of their employment." The supreme court directed the trial judge to determine whether the employee would have been demoted in the absence of the memoranda and, if not, to reinstate him.[32] The case indicates the potential cost of ignoring an employee's rights in this regard. In many units, either by written policy or by practice, employees are required to sign or initial documents placed in their personnel files. While not legally required, this practice is a simple means of proving that the employee was shown the document and is therefore a prudent policy.

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[29] N.C. GEN. STAT. § 115-142(e)(4) (1978). The exception is a dismissal based on conviction of a felony or crime involving moral turpitude.

[30] 42 N.C. App. 404 (1979).

[31] N.C. GEN. STAT. § 115-142(b) 1978.

[32] Miller v. Chico Unified School District, 157 Cal. Rptr. 72, 24 Cal.3d 704 (1979).

Chapter 5

THE PRINCIPAL AND FINANCE

Finance is not a major responsibility of the principal. Compared with other local officials—the board of education, the board of county commissioners, the superintendent, and the school finance officer—he has very little authority in this area. Still, the subject is worth some consideration. Because the financing of schools affects the principal's own efforts, he should understand the process. For that reason, most of this chapter consists of a description of budgeting and financial accounting in the administrative unit. In addition, the principal does have a few statutory duties. These are discussed in the last portion of the chapter.

The Budgeting Process[1]

School budgeting is governed by the School Budget and Fiscal Control Act, adopted in 1975 (effective in most part in 1976) and codified as G.S. 115-100.1 to -100.35. The act was intended to achieve uniformity throughout the state in school budgeting and accounting procedures and to regulate for the first time certain aspects of the cooperative relationship between the county commissioners (the usual tax-levying authority) and the school board. Its basic requirements for budgeting are as follows.

A board may spend money, regardless of source, only in accordance with an annual budget resolution formally adopted before the school year begins. A lawful budget resolution is balanced (that is, appropriations equal anticipated revenue) and shows at least five separate divisions or funds. Four of these are statutorily required—the state public school fund, the local current expense fund, the food service fund, and the capital outlay fund. The budget of most units also contains a federal grant fund. The uniform budget format used in all units is further subdivided into narrower categories: into purpose, function, program, and object for the current expense fund, and into projects for the capital outlay fund. The state public school fund is the unit's portion of the sum appropriated by the General Assembly to the State Board of Education for the schools' current operating expenses (the largest item is salaries). Each unit's share depends mainly on the number of students enrolled in its schools (referred to as ADM—that is, students in average daily membership). The local current expense fund must by law bridge any gap between the unit's state allocation and the amount needed to operate the schools for the year. Whether it must include an appropriation from the county's general revenues depends on what is available from other sources. Those sources are (a) fines and forfeitures collected within the county (which the North Carolina Constitution reserves for the schools' benefit[2]); (b) in nearly half the administrative units, the proceeds of a voted supplemental tax for schools; and (c) state, federal, or private money paid directly to the administrative unit. The capital outlay fund pays for the unit's physical needs—for example, acquiring land, buildings, and buses and constructing, renovating, and furnishing buildings. Capital outlay funds depend primarily on a county appropriation but may also come from a State Board appropriation, bond issues, the local supplemental tax, the sale of capital assets, and insurance proceeds.

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[1] For fuller treatments of the subject, see David M. Lawrence, "Relations Between School Administrative Units and Counties Under the School Budget and Fiscal Control Act," *Local Finance Bulletin* No. 21 (Chapel Hill, N.C.: Institute of Government, 1976); and Robert E. Phay, "Finance and Budgeting for North Carolina Schools," in *School Law: Cases and Materials* (Chapel Hill, N.C.: Institute of Government, 1978), Chap. V.

An analysis of the five budget funds shows that a school board looks to many sources for the schools' support. While not all of the following are available to all units and their importance varies from one unit to another, these are the potential revenue sources in an approximate order of importance: state appropriations through the State Board of Education; appropriations from the board of county commissioners; a voted local tax supplement; federal grants; proceeds from the sale of state or county bonds for capital outlay; fines, forfeitures, and other funds assigned to the schools by law; loans from the State Literary Fund; student fees; and private gifts and endowments.

The board's timetable for budgeting is dictated by law. By May 1 the superintendent submits his budget proposals, along with an explanation, to the board. Ideally, this budget message explains the educational goals embodied in the budget, the reasons for changes from the current year in programs and appropriation levels, and proposals for major changes in educational or fiscal policy.[3] The board reviews the superintendent's recommendations and submits its budget to the county commissioners by May 15. The commissioners act on the school budget by July 1, after which the board of education takes the final step of adopting a budget resolution to govern expenditures for the ensuing year.[4]

Neither of the two boards nor the superintendent makes budget decisions alone. The superintendent usually has consulted with many groups and individuals within the school system over a period of months before formulating his budget. The press and the public may enter the process once the superintendent's formulation is before the board of education. The superintendent must allow inspection of the material he has submitted to the board and may encourage interest at that point by publishing notice that the documents are available for inspection. While formulating its proposed budget, the board of education may hold a public hearing on the matter.[5] If the board does not hold a hearing, the school budget will nevertheless be exposed to public view later as part of the county budget, on which a public hearing is required.[6]

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[2] N.C. CONST. art. IX, § 7.

[3] N.C. GEN. STAT. § 115-100.7(b) (1978).

[4] *Id.* §§ 115-100.9, -100.12 (1978).

Frequently, school board members and county commissioners disagree on how much should be dedicated to the schools from county revenues. Indeed, a certain conflict is inherent in the roles assigned to the two boards. Commissioners guard the county's assets and attempt to divide them fairly among all the groups that compete for financial support. Law enforcement, the jail, social services, and health care, for example, are as essential to the county's well-being as schools and are probably less able than schools to enlist public interest in their adequate maintenance. The commissioners know that the average county spends more than half its revenue on the public schools; it is therefore no wonder that they sometimes conclude that the school board has asked for too much. Board of education members, on the other hand, run and are elected on pledges to improve the schools. Failing to ask for the money needed for excellence would be failing the public trust committed to them. To complicate the issue further, the constitutional and legislative standard for county support of schools is vague. The State Constitution simply requires that the General Assembly provide for a nine-month school term and states that the legislature "may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate."[7] The legislative version of the constitutional mandate says, "[T]he local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners."[8] Neither of these legal formulations is definite enough to prevent differences from arising when reasonable people (commissioners and school board members) meet to ask, "What must the county give the schools this year?"

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[5] *Id.* § 115-100.8 (1978).

[6] *Id.* § 159-12(b) (1976).

[7] N.C. CONST. art. IX, § 2(2).

[8] N.C. GEN. STAT. § 115-100.6(e) (1978).

The General Statutes contain a procedure for resolving disputes when the school board fears that the county appropriation is insufficient to support a nine-month term in the coming year. First, the chairmen arrange a joint meeting of the two boards to be held no more than seven days after the commissioners announce the amount of their appropriation. At the meeting the boards review the entire budget, not merely the disputed portions, in an attempt to resolve their differences. If they cannot agree, either board may refer the matter to the clerk of superior court in the county. This option must be exercised within three days after the joint meeting, and the clerk must decide on a proper amount within ten days after the matter is referred to him. Either board may appeal his decision, again within ten days, to the superior court in that county. There the issue is tried by the judge or, at the request of either board, by a jury. In either case the question is "How much is needed from sources under the county commissioners' control to maintain a system of free public schools?" If the court finds that more is needed than was appropriated, it may order the commissioners to appropriate an additional sum and even to levy additional property taxes to raise that sum. If the clerk's decision is appealed, thus leaving the school board with inadequate operating funds, the commissioners must supply at least the amount furnished in the previous year pending the decision on the appeal.[9]

Rarely does a school board become involved in this procedure. Ordinarily the board accepts the commissioners' appropriation and then formulates and adopts its budget resolution. The School Budget Act imposes a number of important restrictions on the budget resolution, both as first adopted and as later amended. The requirements in effect when the school board adopts the annual budget concern the county appropriation, the voted tax supplement in units that have one, and the stricture that the budget resolution be balanced.

The significant point about the county appropriation is that the commissioners may make a lump-sum appropriation, leaving the board of education to decide on how it will be allocated, or they may themselves allocate some or all of the county appropriation to certain purposes, functions, or capital outlay projects in the schools' uniform budget format.[10] (Commissioners may not, however, allocate for specific items beneath the level of function or project.) One adoption requirement, then, is that the budget resolution reflect the commissioners' allocation. Another is that the budget be balanced.[11] To that end, funds must be appropriated to cover deficits from the prior year and amounts due during the coming year under continuing contracts (contracts that incur obligations to be paid in more than one year). In addition, each fund must be balanced, with the sum of estimated net revenues and appropriated fund balances equal to appropriations in the fund. Each fund may include a maximum contingency appropriation of 5 per cent of its total, to be used during the year if expenses are higher than expected.[12]

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[9] *Id.* § 115-100.11 (1978).

[10] *Id.* § 115-100.9(b) (1978).

[11] *Id.* § 115-100.5(a) (1978).

Several limitations exist with respect to the voted supplemental tax. The board may not request nor may the commissioners approve a property tax levy at a higher rate than that approved by the voters. In estimating the amount to be realized from the tax, the board must include collections anticipated from supplemental taxes levied in preceding years but may not estimate a higher collection percentage for the coming year than that actually realized during the preceding year. (If the tax was not levied in the preceding year, the collection estimate may not exceed the percentage of the general county tax levy collected in the previous year.)[13]

In addition to observing requirements for the budget resolution as adopted, the board is restricted in how it may amend the resolution later. Most important, it must preserve the integrity of the capital outlay and current expense funds by transferring money to or from the funds only in emergencies. The underlying purpose of this requirement is to prevent the commissioners from favoring one school unit over another in counties with more than one unit. Current expense funds are by law distributed to each unit on a per-pupil basis. Capital outlay funds, however, are distributed at the commissioners' discretion. Therefore, without the prohibition against transfer between funds, the commissioners could support one unit at a higher level than another by giving the favored unit a large capital outlay appropriation that could then be transferred into the current expense fund at will. Though the danger arises only in counties with more than one unit, the prohibition applies to all school units.

But emergencies that make a board of education genuinely need money available from another fund *can* occur. The School Budget Act recognizes that possibility and contains a procedure for making a transfer, with the commissioners' approval, in emergencies "unforeseen and unforeseeable" when the budget resolution was adopted. The board by resolution requests the commissioners' permission to transfer a specified amount into or out of a fund. The resolution should explain the emergency, why it was not anticipated, what expenditures will be made or increased with the newly available money, and what items will be eliminated within the fund that loses money. Before the commissioners approve the request, they must allow time for other boards of education in the county to study and comment on the resolution. (Commissioners have 30 days to approve or disapprove the request; failure to act in that time constitutes approval.) When they decide, the commissioners notify any board that has exercised the right to comment on the request as well as the requesting board.[14]

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[12] *Id.* § 115-100.12(b) (1978).

[13] *Id.*

The second major restriction on budget amendment arises when the commissioners have chosen to allocate all or part of the county appropriation. If the commissioners have done so without restricting later amendment by the school board, the school board may amend at will until a point is reached at which the total of the amendments increases or decreases an allocated budget item by more than 25 per cent. For example, after the budget resolution is adopted in July, the school board could increase the food services fund to an amount 10 per cent greater than the original allocation in November, 12 per cent greater in March, and another 3 per cent above the original sum in April—but then it could increase the fund no further. For a larger increase or decrease, the amendment would need the commissioners' approval. The commissioners, however, can choose to regulate school budget amendments more closely than this by specifically setting the terms for amendment when they make the county appropriation; they have the right to require the school board to obtain approval for amendments that increase or decrease an allocated budget item by more than 10 per cent.[15]

Financial Accountability

Before the School Budget and Fiscal Control Act was passed, county finance officers were legally responsible for auditing school spending, though few did so regularly. Now each administrative unit has a school finance officer who performs the fiscal control functions required by the act. This officer, who is appointed by the superintendent and approved by the board, may be but usually is not the same person who serves as county finance officer. More often, he is a full-time employee of the school unit, who may also serve the unit in any other capacity. His duties are numerous. He keeps the unit's accounts according to the prescriptions of the State Board (for funds that come from or through the state) and the Local Government Commission (for all other funds); deposits incoming funds; approves all obligations when they are incurred and later their payment; signs and issues checks, drafts, and state warrants; invests the unit's idle cash; and prepares financial statements when requested by the superintendent, the school board, or the commissioners.[16]

Moneys are handled in different ways, depending on their source. State funds are not actually remitted to the unit. Instead, they are deposited in the state treasury to the credit of the unit, which issues warrants to be drawn on the treasury. Each month the finance officer notifies the State Board's controller of the expenditures from state funds to be made for the month. The controller determines what amount is due and credits it to the unit, after which the finance officer may issue warrants up to that amount.[17] Local funds come from several sources. Those that accrue automatically to the schools—that is, those assigned by law[18]—are turned over to the finance officer by their custodian within ten days after the close of the month in which they are collected. The commissioners' appropriation to the schools from general county revenue is transmitted under any system acceptable to both boards. Only when the boards disagree do they need to resort to the statutory formula, which calls for the appropriation to be remitted in monthly installments sufficient to meet the month's expenses until the appropriation is exhausted. The county finance officer must make this payment to the school finance officer within ten days after the month ends.[19]

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[14] *Id.* § 115-100.13(d) (1978).
[15] *Id.* § 115-100.13(b) (1978).
[16] *Id.* § 115-100.18 to -100.19 (1978).

The third major source of funds is federal appropriations. These may come to the state or county government to be remitted by that government to the unit, or they may come directly to the administrative unit. In any case, the funds are categorical—that is, for specific purposes—and are accompanied by extensive federal reporting requirements.

An important obligation of the finance officer is to issue a preaudit certificate for every obligation (a contract or purchase order) and for every disbursement except payroll checks and state warrants. The preaudit certificate—which is usually a signed[20] and dated statement stamped on the contract, order, or bill—asserts that the amount billed is owed, that the budget resolution contains an appropriation authorizing the expenditure, and that either an encumbrance has already been made for that purpose or the appropriation has a sufficient unencumbered balance to cover the amount. Ordinarily, a bill disapproved by the finance officer will not be paid. In theory, however, the school board may assume the responsibility for overriding his judgment. In that case the board approves payment through a formal resolution that states its reasons, and a board member signs the preaudit certificate. The names of those who voted for the resolution are entered in the minutes because those board members will be liable for repayment to the unit if the payment later proves to be illegal.[21]

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[17] *Id.* §115-100.21 (1978).

[18] Collections from a voted tax supplement, fines, and forfeitures (N.C. CONST. art. IX, § 7); proceeds from the sale of seized taxpaid whiskey (G.S.18A-24); and proceeds from the sale of cars used in racing [G.S. 20-131.3(g)]. In addition, many units share county ABC profits through local acts.

[19] N.C. GEN. STAT. § 115-100.20 (1978).

[20] If approved by board resolution, signature machines may be used. *Id.* § 115-100.22 (1978).

[21] *Id.* § 115-100.24 (1978).

The finance officer is also an investment manager. Subject to whatever restrictions the board has imposed, he invests or deposits the cash balances left in any fund. The interest earned is credited to the fund by which it was generated. Money may be placed in a time deposit in any North Carolina bank or trust company, but investments may be made only in specific classes of securities. The finance officer is responsible only for investing funds actually remitted to the schools; money, such as the county appropriation, that has been allocated to the schools but remains under the control of the allocating agency is not available for investment by the schools.[22]

The Principal's Duties

The law (G.S. 115-100.31) allows individual schools to maintain funds largely outside the framework of budgeting and accounting set forth above. Only a few requirements must be met for these special funds of individual schools, which include gate receipts from interscholastic athletic events, sales of yearbooks and newspapers, the dues of student organizations, and similar accounts.

If the total of the school's accounts is small (less than $300 per year), the board has several choices about how to handle the money. For small funds, there are no legal requirements for handling except that the fund(s) must be audited annually by the person who audits the accounts of the administrative unit.[23] If the board wishes, it may adopt its own policies. It may also choose to have small amounts handled just as larger funds must be—that is, to appoint a treasurer for each school, who keeps records and reports as ordered by the unit's finance officer; to require placement in an official depository of the unit in a special account credited to the school; and to permit payment from the account only through checks or drafts signed by the principal and the treasurer.[24] Or if the board wants even tighter control, it may place funds of individual schools under the control of the unit's finance officer.

If the amount a school handles is $300 a year or more, the first option, nonregulation, is not available. The board must put the funds in the care of either the finance officer or the principal and the school treasurer, who must deposit them and sign checks.

The principal has two other statutory financial responsibilities. G.S. 115-158 requires that he sign the monthly payroll, as an assurance to the state controller and the State Board of Education that it is accurate. G.S. 115-150.4 establishes a detailed scheme for refunding student fees to pupils who transfer during the year, and it assigns the refunding duty to the principal.

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[22] *Id.* § 115-100.26 (1978).

[23] *Id.* § 115-100.30 (1978).

[24] *Id.* § 115-100.31(a) (1978).

Chapter 6

PROPERTY

The principal has a dual responsibility concerning school property: one, to keep conditions safe for those who use the property and two, to prevent damage to the property. Many of the specific details of these duties are spelled out in the North Carolina General Statutes; some are part of the common law (the law that is derived from court decisions). The principal has numerous obligations with respect to fire prevention, as well as a duty to eliminate unsafe and unsanitary conditions. He must do what he can to prevent vandalism or negligent damage by students or suffer financial consequences himself. When damage does occur, he is responsible, in the early stages, for efforts to collect the cost of repair from the parents of the students who caused the damage. Recent increased use of schools by community groups adds to the principal's duties.

Preventing Fires

National Fire Prevention Association statistics for 1978 show that while only 2.1 per cent of fires were school-related, these fires (some 24,000 of them) caused close to $96,800,000 in damage.[1] Property loss, of course, is an insignificant consideration compared with the possibilities for loss of life in school fires. It is not surprising, therefore, that the General Assembly has spelled out precisely what the principal is to do to prevent fire. His duties are as follows.

Fire Drills. A drill must be held every month in each building where students are housed. The first drill must take place within the first week of school. All pupils and employees must take part in the drills, which should use various routes so as to simulate evacuation under different conditions. Additional requirements can be set by the Commissioner of Insurance, the Superintendent of Public Instruction, or the State Board of Education, and any such regulations must be permanently posted on a bulletin board in each building.[2]

Principal's Inspections. Several portions of the General Statutes require the principal to inspect buildings in his charge for fire hazards.

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[1] *Education USA* (Washington, D.C.: National School Public Relations Association, September 24, 1979), p. 28.

[2] N.C. GEN. STAT. § 115-150 (1978).

One statute requires twice-monthly inspection to see that trash has not accumulated in cafeterias, gymnasiums, boiler rooms, storage rooms, auditoriums, classrooms, attics, basements, or elsewhere. The principal must see to it that trash is removed daily[3] and other hazards as soon as he notices them.[4] He must keep passageways and exits clear and doors in good working order and unlocked when the building is occupied.[5] Combustible materials must be stored in a well-ventilated place.[6] Finally, the principal is to keep anyone from adding to existing electrical wiring in his buildings without authorization from the superintendent.[7]

Principal's Report. Once a month the principal is to file a report with the superintendent (with a copy for the school board) giving the date of the last fire drill, the time it took to evacuate each building, certification that inspections have been made, and any other information requested by the Insurance Commissioner, the State Superintendent, and the State Board.[8] He has additional reporting obligations concerning the inspections required to be made by outsiders (building or electrical inspector, fire marshal, or other). First, the principal must inform the superintendent if the required outside inspections are not being made;[9] and, second, if they are being made, what conditions are uncovered that need to be remedied.[10]

The principal's fire prevention duties are heavy ones. He has not only a number of specific obligations to perform himself but also general supervisory responsibility for seeing that other persons perform their duties in this regard. Final proof of the General Assembly's seriousness, if it is needed, is the fact that willful failure to perform the duties is a misdemeanor.[11]

Preventing Damage

The General Assembly specifically requires principals to preserve school property. It also gives local school boards the power to prescribe principals' duties in this regard.[12] G.S. 115-133 directs the principal (and others) to inform the board immediately of "any unsanitary condition, damage to school property, or needed repair."[13] Next the law states that (1) principals, teachers, and janitors are responsible for the safe-keeping of the school during the session; (2) they must discipline students so as to prevent damage; and (3) if they fail in properly supervising students, they themselves are financially liable for damage caused by students. G.S. 115-149 contains similar language, with amplified directions. It states that principals and teachers are to instruct students in how to care for school property and, again, that they will be liable if a negligent failure to supervise results in damage.[14]

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[3] *Id.* §§ 115-150, -150.1(5) (1978).
[4] *Id.* § 115-150.2(4) (1978).
[5] *Id.* § 115-150.1(1) (1978).
[6] *Id.* § 115-150.1(3) and (4) (1978).
[7] *Id.* § 115-150.1(2) (1978).
[8] *Id.* § 115-150 (1978).
[9] *Id.* § 115-150.1 (1978).
[10] *Id.* §§ 115-150.1, -150.2(4) (1978).
[11] *Id.* § 115-150.3 (1978).
[12] *Id.* § 115-45 (1978).
[13] N.C. GEN. STAT. § 115-149 directs the principal to report the same items to the superintendent.

If children cause damage carelessly or deliberately, the principal can and should, according to the statutes, expect their families to pay. Damage is to be reported to parents and, if they do not pay, to the superintendent.[15] State law makes parents liable for up to $500 for their children's willful or malicious destruction of public property.[16]

The school board depends on reporting by principals to identify damage. Once made aware of it, the board has several statutory aids to help in recouping losses. It can pay awards of up to $300 for information concerning persons who have injured or stolen school property.[17] Five criminal statutes punish acts of violence against school property. G.S. 14-60 and G.S. 14-67 designate burning or attempting to burn school buildings as felonies. G.S. 14-132.2 makes willfully damaging a school bus a misdemeanor. Both G.S. 14-132 and G.S. 14-273 penalize as a misdemeanor an act causing deliberate injury to school property.

Keeping Premises in Safe Condition

State law (G.S. 115-133) directs the principal to report unsanitary conditions, damage, or needed repairs, but even without this legislation he would be legally obligated to concern himself with the school's physical condition. The common law of torts (see pages 16-19) requires the principal to act as a reasonably prudent person charged with similar duties would act in guarding the safety of persons on school premises. If he is careless of their safety (the legal term is negligent), the principal will be liable in damages for certain costs of the injuries that result. The crucial point to note in this regard is that the school board itself and the county commissioners as its tax-levying authority are protected from liability by the doctrine of governmental immunity. The individual school employee—that is, the principal—is not. (See Chapter 8 for a discussion of liability and immunity.)

The principal's duty with respect to students' safety is discussed at length in Chapter 2. It should be recalled that the duty varies according to circumstances—such as the age, maturity, health, and intelligence of the children involved. Keeping school buildings, grounds, and equipment in good shape and free from hazards is an important part of the duty. The same care must be taken to protect employees and any other persons invited into the school, with the obvious difference that situations hazardous for children may not be so for adults. Somewhat less care is required for the safety of persons who have not been invited to the school but nevertheless are not forbidden to be there.[18]

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[14] The statute permits deductions from teachers' and principals' final vouchers to cover repairs of damage they have allowed.

[15] N.C. Gen. Stat. § 115-149 (1978).

[16] *Id.* § 1-538.1 (1969).

[17] *Id.* § 115-133.2 (1978).

Use of School Facilities by Outsiders

Pressure from outsiders to share school facilities is considerable and probably will increase as enrollment declines. Since the typical North Carolina county devotes more than half of its revenue to the schools, it is understandable that many elements in the community view them as a community resource—but it is also understandable that school officials are not always eager to share facilities. First, they realize that their primary duty is to conserve the school system's resources for students' use; second, they may be concerned with additional exposure to liability.

The local board of education determines whether to allow outside use of school property except when the General Assembly has directed otherwise. Several legislative directives exist, and all point toward greater community use. One statute allows the State Board to permit the establishment of a community college wholly or partially located in public school facilities, but only on petition of the local school board.[19] Another requires the board to let political parties use the schools for precinct meetings and county and district conventions. The board may regulate this use of buildings to prevent interference with school activities but may not charge a fee higher than the cost of custodial services and utilities.[20] A third, G.S. 115-133, allows the board to permit use of school facilities for other than school purposes if the use would not harm the facilities.

In 1977 the legislature, at Governor Hunt's request, strongly encouraged the sharing of school resources by passing the Community Schools Act.[21] The stated purposes of the act are to increase (1) the use of school facilities by governmental, charitable, and civic organizations; (2)

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[18] A legal distinction is made between a "licensee" and an "invitee." The former's presence is either expressly or impliedly permitted by the owner (here, principal), but he has not been invited. Duty toward a licensee is less in that "the owner owes a licensee only a duty to abstain from injuring him willfully or wantonly. But the owner owes an invitee a duty of exercising reasonable care for safety commensurate with the circumstances involved and the age and capacity of the individual. As far as the invitee is concerned, the right to protection from injury is a positive one in that the owner not only must refrain from injurious acts but also must warn the invitee of any hidden or concealed perils which may be on the premises." L. Peterson, R. Rossmiller, and M. Volz, *The Law and Public School Operation*, 2d ed. (New York: Harper and Row, 1978), p 253.

[19] N.C. GEN. STAT. § 115A-5 (1978).

[20] *Id.* § 115-133.3 (1978).

[21] *Id.* §§ 115-73.6 to -73.12 (1978).

the use of community volunteers for tutoring, counseling, and special projects within the school program; and (3) communication between public school personnel on the one hand and community agencies and the public on the other. Under the act, school units submit plans, based on State Board guidelines, to apply for state funding of up to 75 per cent of the cost of their program. Plans differ, but every unit's plan must include employment (or designation) of a community-schools coordinator and establishment of an advisory council, half of whose members are parents of public school students. The act's coverage, especially in the area of program or curriculum, is considerably broader than property matters, but the effects on property control can be significant. All but about 25 of the state's units currently receive community school funds.

Units that operate under community schools plans invariably find many programs occupying school facilities that have never before been held there. The new programs fall into two categories—school-sponsored or nonschool-sponsored—and the distinction ought always to be clear to both participants and school officials, particularly the principal of the school where the program is located.[22] If the program is sponsored by the school system, its participants are entitled to the same protection that is accorded to students and employees of the regular-day sessions. For example, a number of units have initiated after-school day-care programs in the schools. The programs are planned, approved, and operated by the school board and its employees; therefore the school unit bears full responsibility for supervision and safe facilities. The principal in whose building the day-care program is housed must be as concerned about the program's operation as about the regular program. Presumably, the board will hire others to relieve the principal from personally overseeing evening, night, or early morning programs; the point is, though, that the initial responsibility is his or the board's.

A different situation exists when outside groups simply want to use the school's physical facilities. In that case, the school system and principal should not be obligated for supervision[23]—only for maintaining reasonably safe premises. Many units set limits to their responsibility through contracts signed by each group that holds an event in the school. All units should adopt this procedure. As second-best policy, if the board does not require a contract, the principal should undertake to tell sponsors of nonschool programs that he will not provide supervision.

Opening the schools to the community undoubtedly places greater burdens on the schools' personnel and facilities. The state-level administrators of the community schools program recognize that fact and encourage units to apply for funds for opening, cleaning, and locking buildings and, where necessary, supervision entailed by the additional burden.[24]

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[22] See note 18 above for distinction between licensees and invitees.

[23] But principals have asked whether they do not have some responsibility when they actually see a dangerous situation existing in the schools, even though the program may be run entirely by a nonschool group. The answer is yes. They have a moral responsibility—and possibly also a legal responsibility—to report the situation to the superintendent or the school board.

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[24] Conversation with Dr. James A. Clarke, Director, Division of Community Schools, Department of Public Instruction, September 28, 1979.

Chapter 7

TRANSPORTATION

In 1955 the General Assembly shifted operational responsibility for public school transportation from the State Board of Education to local boards, where it remains. Financial responsibility continues to rest almost entirely on the state. North Carolina's transportation system is among the nation's largest, carrying nearly three-quarters of a million passengers daily. It has a lower per-pupil cost than any other state's system, primarily because it relies heavily on student drivers (nearly 80 per cent).

Although it is ancillary to education, transportation is one of the school's most serious responsibilities because of the ever present possibility of injury or death. Most state laws and State Board of Education regulations in this area are based on safety factors. Besides the state's general traffic safety laws, there are statutes regulating buses, drivers, route choice, and pupil assignment that reflect the same concern. Other portions of the law address issues of liability and compensation for accident victims. After safety, the law's major emphasis is fairness: who will ride, how can special arrangements be made, when and how may parents protest the school's decisions?

The principal plays an extremely important role in the transportation system. By statute he is responsible for assigning riders, choosing routes, and following up on reported defects in buses. Although every unit has a transportation supervisor and large units have route supervisors as well, the principal retains the duty to supervise closely the work of persons who exercise his statutory duties.

Buses

The principal's first duty is to know the physical condition of the buses his students ride. He gains the knowledge from two sources: the inspection report sent to him monthly on each bus and the oral reports of unsafe conditions made to him by drivers.

Buses are of two kinds, either regular or activity, depending on the purposes for which they are used.

Regular. Regular school buses may be used for certain purposes only: (1) transporting students and employees to and from school or other instructional programs, including educational field trips; (2) taking a student or employee to a doctor or hospital for emergency medical treatment; and (3) making evacuations ordered by civil defense authorities.[1]

Each bus purchased for regular to-and-from school use must meet physical specifications approved by the State Board. If the bus replaces one being retired from service, its purchase price is paid from state funds allocated to the local board. If not—that is, if the bus is an original purchase for expanded service—the board must pay the cost from local funds provided by the tax-levying authority. The state bears most expenses of maintenance, insurance, and operation.[2] Schools are exempt from both vehicle registration fees[3] and the state gasoline tax.[4]

Storage and maintenance are large-scale activities supervised by the county school board in all counties, including those that contain city school administrative units. Each bus is inspected every thirty days during the school year. Following inspection, a report on its condition is filed in the superintendent's office and a copy is sent to the principal whose school the bus serves. Mechanical problems that arise between inspections are reported by the driver to the principal and by him to the superintendent or to the chief mechanic or supervisor of transportation as the superintendent's delegate. If the vehicle is unsafe, it must be removed from service until the unsafe condition is remedied.[5] State law makes the use of school garage services for any purpose other than maintaining school vehicles a misdemeanor,[6] and quite recently the General Assembly extended its control over the garages by authorizing the State Board to develop and enforce standards for chief mechanics and transportation supervisors in the local units.[7]

Activity. While it can be said that every school activity serves an educational purpose, the transportation statute differentiates between needs directly linked to the curriculum and the needs of extracurricular activities. Local units must purchase buses in addition to the regular buses if school transportation is to be provided for teams, bands, and similar groups.

Special requirements apply to activity buses. The board must buy them with local funds. They may be serviced in the garage maintained for regular buses, but the unit must reimburse the state for such costs as labor, gasoline and oil, parts, and tires. Labor-cost reimbursements due the state may be used to pay the salary of the mechanic who works on an activity bus. The state's contribution to replacing an activity bus is limited to inspecting an old bus and making a recommendation on whether it is safe to use as an activity bus; the unit pays for a new bus or second bus if it purchases one.

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[1] N.C. GEN. STAT. § 115-183 (1978).

[2] *Id.* §§ 115-181, -188 (1978).

[3] *Id.* § 20-84 (1979 Supp.).

[4] *Id.* § 105-449 (1979).

[5] *Id.* § 115-187 (1978).

[6] *Id.* § 14-248 (1969).

[7] *Id.* § 115-188.1 (1978).

Regular buses have a speed limit of 35 mph, but activity buses may travel at 45 mph. The reasons for the higher speed allowance are obvious: activity buses travel longer distances, make fewer stops, use major roads often, and drive at times when school-to-home traffic is at a minimum. Nevertheless, as long as the common practice continues of purchasing retired regular school buses for use as activity buses, many activity buses should not, for safety's sake, be driven fast.

Drivers

School bus drivers are local board employees.[8] The board hires drivers who meet the basic qualifications established by the State Board and assigns them to schools. Drivers are supervised by the principal of the school to which they are assigned.[9] State Board requirements are few. A driver must be at least 16 years old (more than 70 per cent are high school students), be physically fit, hold an operator's or chauffeur's license, have completed a school bus driving course, and have been awarded a certificate. The State Board requires certificate renewal every four years, and the Division of Motor Vehicles exercises authority over cancellation.[10]

The State Department of Public Instruction's (DPI) Division of Transportation plays an advisory role in driver-training through its publications and direct consultation. An instructor from the Division of Motor Vehicles (DMV) within the State Department of Transportation actually trains the new drivers: 12 hours of classroom instruction and at least 12 (often more) hours of instruction on the road. The unit's chief mechanic or transportation supervisor assists in the training and certification of each driver trainee. He is responsible for any additional instruction provided by the unit following the DMV course.

Some units try to maintain an adult driving staff; most do not. Since North Carolina accident statistics show that sixteen-year-old drivers have the poorest safety record, the units that use student drivers should be particularly generous in committing resources to training.[11] In fifteen of the larger units, state allocations pay for a supervisor of transportation who coordinates the transportation system. Some other units pay for the position from local funds. In many units, however, responsibilities continue to be shared, as the statutes direct, by the board, the superintendent, and the principals.

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[8] *Id.* § 115-185 (1978). However, workmen's compensation coverage for drivers is provided by the State Board. *Id.* § 115-192 (1978).

[9] *Id.* § 115-185 (1978).

[10] N.C. Department of Public Instruction, *Administrator's Handbook for School Transportation* (Raleigh, 1976), pp. 30-32.

[11] Judith McMichael, *School Bus Accidents and Driver Age* (Chapel Hill: Highway Safety Research Center, 1974). A resolution of the State Board of Education (April 1977) recommends that all persons hired as bus drivers have at least six months of driving experience.

Monitors/Safety Assistants

The General Assembly recognizes the difficulty and importance of keeping order on the bus and offers the principal alternative methods of control. If they are available, he may appoint unpaid volunteer monitors (often parents, but the statute does not specify adults), who serve at his pleasure.[12] Or, if the board has funds,[13] it may hire safety assistants, whose function is to help the driver with the "safety, movement, management and care of children boarding the bus, leaving the bus, or being transported in it." The assistant, who must be either an adult or a student who is certified as a substitute bus driver, is recommended by the principal to the superintendent and finally to the board.[14]

Routes

Principals and the superintendent cooperate in choosing bus routes. The principal plans a route, with designated stops, for every bus assigned to him and submits the plan for the superintendent's approval before school opens each year. (The only legal limitation is that he may not assign a bus to travel a divided highway that passengers must cross unless there is a traffic light at the crossing point.)[15] If he wishes, the superintendent may consult with a knowledgeable person in DPI's Division of Transportation. Once routes are approved, they are filed in the superintendent's office and can be altered only through the same procedure—suggestion by the principal and approval by the superintendent. Changes must be filed at least ten days before their effective date. Buses may be operated only along these official routes.[16]

Passenger Assignment

Those units that elect to provide transportation (all but one) may carry both students and employees. All students who live 1½ miles or more from their school or whose walking routes are dangerous are entitled to transportation, and state allocations are based on the cost of transporting them. Students who live within 1½ miles may be accommodated if carrying them adds no cost or if the board pays the cost from local funds.

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[12] N.C. GEN. STAT. § 115-185(d) (1979 Supp.).

[13] *Id.* § 115-185 (1979 Supp.) allows state transportation funds for children with special needs to be used for safety assistants on buses that carry children with special needs. For assistants on other buses, the board must use either local funds or a (rare) surplus from its state transportation funds for other purposes.

[14] N.C. GEN. STAT. § 115-185(e) (1979 Supp.).

[15] *Id.* § 20-217.1 (1978).

[16] *Id.* § 115-186 (1978).

Transporting employees is of secondary importance. Employees may not be assigned to a bus if carrying them would require rejecting students who live beyond 1½ miles or overcrowding the bus to an extent that interferes with comfort or safety.[17] (Until recently, State Board regulation established the maximum capacity of school buses at 125 per cent of seating capacity. The regulation now requires a seat for every child but it is not expected to be implemented fully before the 1981-82 school year.)

The principal of the school to which a bus is assigned assigns its passengers. In general, he plans routes and makes assignments to insure, first, that each student who lives 1½ miles or more from school has a ride from a pick-up point no more than a mile from his home and back to that point after school. (According to an Attorney General's opinion,[18] the school may but is not required to honor parents' request that a child be carried to a destination other than his home.) As noted earlier, greater latitude is allowed in deciding whether to transport students who live within 1½ miles of school and employees.

Occasionally a student's home is so inaccessible that bus transportation to the school in his geographic attendance district is simply not feasible. In that case, the principal has alternatives. If transportation to another school in the unit is more convenient, he may offer the student a choice of being reassigned or providing his own transportation to the school in his district. If bus transportation to any school is infeasible, the student must either arrange his own transportation or board during the school term at a place from which he can be transported. If he chooses the latter option, his parents may be reimbursed $50 a month for his expenses.[19]

An appeals procedure is available for families that disagree with the principal's decisions on routes or on whether a child is entitled to bus transportation. The first appeal is to the board. A majority of members is a quorum for the hearing, and they are to decide the matter by majority vote. A board decision adverse to the child may be appealed within ten days to superior court. At this level the family is entitled to a jury trial on the merits of their complaint and to the usual processes of appeal to higher courts.[20]

Safety Laws and Regulations

School bus driving is closely regulated. In addition to the driver-training requirements, the speed limit is set at 35 mph and enforced by means of speed governors on every vehicle. (Activity buses and the 16-passenger buses used for children with special needs, however, may be driven 45 mph.) Violating the speed limit for school buses and driving without a certificate are misdemeanors.[21] When a bus is routed along a divided highway, passengers may be picked up or discharged only where there is a traffic light to help them cross.[22]

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[17] *Id.* § 115-184(f) (1978).

[18] 41 N.C.A.G. 788 (1972).

[19] *Id.* § 115-189 (1978).

[20] *Id.* §§ 115-184(d) and (e) (1978).

The statutes impose safety requirements on persons other than the bus driver. The State Department of Transportation must maintain the roads along bus routes so as to accommodate loaded buses safely.[23] Motorists approaching a school bus from any direction on the same road must stop if the bus has stopped or is picking up or discharging passengers. (This provision does not apply to motorists who meet a bus coming from the opposite direction on interstate or other controlled-access highways, all of which are divided.[24]) The Department of Transportation and local authorities may set a speed limit for school zones as low as 20 mph.[25] Conviction of speeding in a school zone carries a penalty of three points assessed against the driver's license plus a fine,[26] and passing a stopped school bus carries a five-point penalty. Persons who disobey a driver's or principal's orders by entering or refusing to leave a bus are guilty of a misdemeanor.[27]

Accident Compensation

The General Assembly has established a plan for at least partly compensating persons injured either by negligence of a bus driver or by mechanical defects that result from the negligence of bus mechanics. The North Carolina Industrial Commission hears these cases, and the state pays any damages that are awarded.[28] But the plan covers only a fraction of the accidents that involve school buses. Injury-causing accidents may be the fault of no one, of persons not associated with the schools, or of students or school employees other than the bus driver or mechanic. Often the injured person has contributed to the situation through his own negligence.[29] In none of these circumstances can he or his representative recover under the School Bus Tort Claims statute (G.S. 143-300.1). Another section of the General Statutes,[30] however, authorizes the State Board to pay not over $600 for the medical or burial expenses of a student injured while "boarding, riding on, or alighting from" a regular school bus going to or from school or operating on school grounds. Claims must be filed promptly (within a year of the injury or death) and any amount paid to the injured person must be paid back to the board if he later recovers damages through a civil judgment. The major advantage of the procedure from the eligible victim's viewpoint is that it is available without regard to negligence. The disadvantage is the ridiculous insufficiency of the amount to compensate for serious injury or death.

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[21] *Id.* § 20-218 (1977).

[22] *Id.* § 20-217.1 (1978).

[23] *Id.* § 136-18(17) (1979 Supp.).

[24] *Id.* § 20-217 (1978).

[25] *Id.* § 20-141.1 (1978).

[26] *Id.* § 20-16(c) (1978).

[27] *Id.* § 14-132.2 (1979 Supp.).

[28] *Id.* § 143-300.1 (1978).

[29] For example, an injured student/driver would not be able to recover if his negligence caused the accident.

[30] N.C. GEN. STAT. §§ 115-193 to -197 (1978).

Chapter 8

PRINCIPAL'S LIABILITY

Civil Liability

The principal of a public school occupies a prominent position in a community. His professional actions are often highly visible and, because they affect the welfare of children, likely to be of considerable importance to parents and others. Inevitably, a certain number of his decisions will be controversial, and a few may result in litigation. Thus it is important for him to understand the nature and consequences of his potential liability.

The liability of public officials is a complex matter in which courts are seeking to balance competing interests. On the one hand, the law protects public officials from the consequences of some of their actions in order to ensure that well-qualified people accept offices and feel free to exercise their best judgment on important issues without undue fear. On the other hand, to protect the public, the law makes public officials liable for certain failures in executing their duties.

When a principal is sued, the local board of education that employs him is frequently sued also. One must differentiate, because the law does, between board liability and the principal's personal liability. The major importance of the distinction lies in the fact that if a board is liable for damages, the public treasury pays, whereas a principal who is liable pays from his own personal funds. The following discussion explains the two liabilities and the close relationship between them.

Taking board liability first—were it not for legal doctrines protecting them, school boards would be liable for the injuries (torts) they and their employees do to others through either carelessness (negligence) or deliberate ill will (malice). (See the discussion of torts on pp. 16-19.) As it is, the boards are partially insulated from the effects of their mistakes. The doctrine of governmental immunity provides much protection, though the United States Supreme Court has recently eliminated it in the area of federal violations. Governmental immunity means that a government may not be sued for its torts unless it consents to the suit. The State of North Carolina has partially waived its immunity through a Tort Claims Act,[1] and it permits school boards to waive their immunity by purchasing insurance.[2] Some boards carry such insurance, primarily to compensate accident victims.

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[1] N.C. GEN. STAT. § 143-291 (1979 Supp.). The State Tort Claims Act does not cover principals, who are considered local rather than state employees. Separate statutes, however, do admit state

Until recently, boards were also protected from most damage claims involving violations of federal rights. Most such actions are based on Section 1983 of the United States Code, which forbids a *person* who is acting for the state to deprive another of rights guaranteed by the Constitution or laws of the federal government. Since the United States Supreme Court had decided that local governments were not "persons,"[3] school boards had been free from fear of suit under Section 1983. In 1978, however, the Court changed its position on that point in *Monell v. New York City Department of Social Services.*[4] It held that a school board *is* a person and would, under then-unspecified circumstances, have to pay damages to people injured by its official policies or even by customs that infringe on civil rights. The Court's next decision in this area, in *Owen v. City of Independence, Missouri*,[5] deprived school boards of the "good faith" defense; that is, it held that boards must pay damages even though they had no way of knowing when they acted that they were violating constitutional rights. The Court pointed out that when a person has been damaged in a violation of Section 1983, one of three entities must bear the burden—the victim, the public official who injured him, or the public represented by the governmental body. It concluded that the cost was best borne by the public. Most recently, in *Maine v. Thiboutot*, the Court greatly expanded school boards' potential liability by holding that Section 1983 applies to deprivations of purely statutory rights as well as to civil rights violations and that attorneys' fees are owed to persons who successfully pursue statutory claims.[6]

There is a close connection between the liability of school boards, discussed above, and the likelihood of actions against principals. For obvious reasons, if the chances of success are approximately equal, most plaintiffs would prefer to bring an action against the board.[7] The board certainly has a deeper pocket. Also, the judge and jury are likely to be more sympathetic to a principal faced with personal financial loss than to a county treasury. Until now, the one advantage of proceeding against the principal has been his lesser immunity, but in the wake of the *Monell*, *Owen*, and *Thiboutot* decisions it is likely that a number of actions involving federal rights violations will be filed against boards

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liability for negligent acts or omissions of school bus drivers and mechanics [G.S. 143-300.1 (1978)] and for any school employee (including principals) sued on the basis of health care rendered to students in the course of duty [G.S. Ch. 143, Art. 31B (1979 Supp.)].

[2] N.C. GEN. STAT. § 115-53 (1978).

[3] Monroe v. Pape, 365 U.S. 167 (1961).

[4] 436 U.S. 658 (1978).

[5] — U.S. —, 63 L.Ed. 2d 673, 100 S.Ct. — (1980).

[6] 48 U.S.L.W. 4859 (June 25, 1980).

[7] Of course, the plaintiff does not have to choose. He may sue both board and principal and is especially likely to do so in the first stage of litigation.

rather than the individual school official concerned. How long the trend continues will depend on the outcome of the first cases. It must be remembered, however, that the recent Supreme Court decisions affect only liability for deprivation of constitutional or federal statutory rights. In other areas of law (tort actions for physical injuries, for instance), uninsured North Carolina school boards enjoy complete immunity from suit. Moreover, boards are not liable even in the area of federal rights if the principal was acting on his own rather than carrying out official policy.[8]

Suppose an injured person sues the principal instead of, or in addition to, the board. Under what conditions will the principal be liable? The answer depends, for one thing, on whether the wrong allegedly committed by the principal is a deprivation of federal rights—i.e., a Section 1983 action. (As examples, Section 1983 would probably be the basis for an action against a principal for censoring a student newspaper, searching a student, firing a teacher for exercising First Amendment [free speech] rights, or improper suspension.) If so, the principal or other school employee enjoys some protection through the doctrine of qualified or official immunity. This legal doctrine is similar to governmental immunity but not so complete. It holds that the public official (in this case the principal) is not liable for his official acts[9] unless he knew or reasonably should have known that his action violated the victim's basic constitutional or statutory rights. Unless he knew or ought to have known that he was acting wrongly, he is held to have acted in "good faith" and cannot be penalized for his mistake. Decisions following the 1975 United States Supreme Court case[10] setting out that rule make it clear that school officials are not expected to be fortune-tellers—they need not guess the future direction of the law. They are held accountable only for acting in accordance with already-established legal principles.[11]

Except for Section 1983 actions, a principal probably has no immunity from civil liability. The question is determined by whether the principal is a public official who exercises "discretionary" powers or one whose powers are "merely ministerial." If he is the former (a category clearly including individual school board members, for example), he would be protected almost as fully as the board itself is protected and would be liable only if shown to be exercising power for corrupt or malicious reasons.[12] It is more likely, however, that principals fit into the latter category of public officers and employees—those who perform ministerial duties under the instruction of policy-makers. These employees are held civilly liable for improper performance.[13] Thus the principal would be liable to any injured person to whom he had a duty if he negligently or deliberately breached the duty and the person was injured as a foreseeable result. He is not, however, responsible for the torts of those who work under him if he had no particular reason to know that they would commit a tort.

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[8] Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).

[9] Official acts are those that logically arise from the employment. One source says that they are acts "closely connected with what the individual was employed to do, as well as those reasonably incidental, even though they may be improper methods of carrying out the objectives of the employment. The fact that the act has been expressly forbidden by the employer does not in itself prevent the act from being within the scope of employment." Joseph E. Ferrell, "Legal Liabilities of Counties and County Commissioners," in Joseph E. Ferrell (ed.), *County Government in North Carolina* (Chapel Hill, N.C.: Institute of Government, 1979), pp. 256-57.

[10] Wood v. Strickland, 420 U.S. 308 (1975).

[11] The Supreme Court's phrase in Wood was "settled indisputable law." Federal courts of appeals have interpreted this to mean that school officials need obey only Supreme Court decisions and clear legal precedents binding in their jurisdictions. Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975); Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329 (6th Cir. 1975). One federal district court, however, went further. In refusing to direct a verdict in the school's favor over a student search, it said, "[L]aw can be settled without there having been a specific case with identical facts which was decided adversely to the school officials." Picha v. Wielgos, 410 F. Supp. 1214, 1219 (N.D. Ill. 1976). Two district courts recently found

A principal who is concerned about the possibility of personal liability—and it is a real threat, unless the school board has purchased insurance covering him—may wish to purchase his own insurance. Another avenue for resolving the problem was opened by the 1979 General Assembly—though it has not yet been used, to my knowledge. A new statute, G.S. 115-53.1, authorizes school boards, if they wish, to defend current and former employees (and board members) in civil or criminal actions based on their school functions and to pay judgments entered against them. In order to do so, however, the board must have been notified of the litigation before its completion and must have previously adopted public policies on when to defend or pay judgments.

Statutory Penalties

The General Assembly sees some of the principal's duties as so important that it attaches severe, sometimes criminal, penalties to the failure to perform them. The following is a list of these obligations and the consequences connected with them:

G.S. 115-143. The principal, like every other public school employee, must file a certificate signed by a North Carolina physician stating that he has no communicable disease and also no mental or physical disease that would impair job effectiveness. This must be filed before beginning initial employment or on returning from an absence longer than one

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that school officials did not meet the Wood good-faith test and were liable for damages. Eckerd v. Indian River Sch. District, 475 F. Supp. 1350 (D. Del. 1979) (board members who voted to dismiss teacher for criticizing administrators are personally liable); M.M. v. Anker, 477 F. Supp. 837 (E.D.N.Y. 1979) (teachers liable for searching student without a reasonable suspicion that she was concealing evidence of crime).

[12] Betts v. Jones, 203 N.C. 590, 166 S.E. 589 (1932); 208 N.C. 410, 181 S.E. 334 (1935).

[13] Ferrell, "Legal Liabilities," pp. 262-63.

year. Thereafter, he must file an annual physician's certificate that he is free from communicable tuberculosis. Violation is a misdemeanor carrying the possibility of a fine and imprisonment for up to two years.

G.S. 115-150 through -150.3. The principal is given numerous specific duties in regard to fire prevention. These include holding fire drills, removing hazards, and making regular reports. (See Chapter 6, "Property," for a fuller description.) Violation is a misdemeanor with a maximum penalty of $500 in fines.

G.S. 115-148. The principal must make any reports requested by the board of education before the superintendent may approve payment of the principal's salary. A principal who knowingly and willfully falsifies attendance records or gets someone else to do so commits a misdemeanor, punishable by a fine and up to two years' imprisonment. Furthermore, if he is convicted, his certificate is revoked.

G.S. 115-167. The principal is required to follow the attendance regulations of the State Board of Education. (See Chapter 2, the section entitled Compulsory Attendance, for a description.) Failure to do so is a misdemeanor punishable by a fine and up to two years' imprisonment.

G.S. 115-133. The principal is responsible for keeping school buildings safe while school is in session. If damage occurs because of his failure to discipline students, he is financially responsible for repairs.

G.S. 115-149. Requirements and penalty are nearly identical to those above.

G.S. 115-206.17. The principal must follow the superintendent's directives on distributing textbooks. The superintendent is to withhold salary until the duties are performed.

G.S. 115-198. The principal must see that all classes except foreign language classes are held in English. Failure to do so may, according to the state statute, result in dismissal. In fact, though, since the United States Supreme Court decision that interpreted Title VI of the 1964 Civil Rights Act to require bilingual instruction for certain children who do not speak English,[14] a teacher or principal probably cannot be penalized for not using English in the classroom.

Conflicts of Interest

Several other state statutes impose penalties. They are considered together here, under the heading of conflict-of-interest laws, because of their common purpose—to keep a person from profiting unfairly from his public employment.

Four of these statutes regulate the use of vehicles by public employees. One law punishes any use for private purposes of a vehicle owned by the state or a local government;[15] another punishes the failure to mark a vehicle as being publicly owned;[16] and a third makes it unlawful to repair a private vehicle at public expense.[17] G.S. 14-251 makes violation of any of these a misdemeanor punishable by up to six months' imprisonment, a $100-$500 fine, or both.

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[14] Lau v. Nichols, 414 U.S. 563 (1974).

[15] N.C. GEN. STAT. § 14-247 (1969).

A statute that may apply to principals forbids an official to make a contract as an official that will benefit him as a private individual or to enjoy the benefits of such a contract. The statute, G.S. 14-234, applies to "any person appointed or elected a commissioner or director to discharge [a public] trust." Unquestionably it covers all elected or appointed officials, not only those called "director" or "commissioner." What is not clear is whether it also covers public employees. At least one authority would read the statute broadly enough to include principals. His view is that it covers any person with the authority to contract for his governmental unit,[18] a category that sometimes includes principals.

The law against self-dealing in contracting has been a serious inconvenience for relatively unpopulated North Carolina units—so much so that the 1979 General Assembly added an exemption for officials of towns no larger than 7,500 and counties or multi-county regions containing no town larger than that. There is no exemption as yet for small school units.

Another statute, which clearly does apply to principals, covers somewhat similar ground. G.S. 14-236 forbids any school official or employee to sell merchandise to his own school or school unit. Employees may not (1) have a pecuniary interest, even indirectly, in the sale of goods to the schools, (2) may not act as an agent for a sale, and (3) may not accept any gift in return for recommending the use or purchase of goods. The penalties are loss of one's job and conviction of a misdemeanor punishable by a $50-$500 fine and imprisonment.

Surprisingly, considering the age of these statutes,[19] only a few cases interpreting them have come before our state or federal appellate courts.[20] The cases that have arisen address such issues as what constitutes a pecuniary interest,[21] whether penalties will be imposed for unknowing violations,[22] and what the school unit would owe for goods or services rendered under an illegal contract.[23] Though few in number, the cases serve clear warning that these are strict laws, strictly interpreted. A court has enforced them, for instance, even against a school board member who did not know that the board had contracted with his company, so that moral blame could not possibly have been at issue.[24]

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[16] *Id.* § 14-250 (Supp. 1979).

[17] *Id.* § 14-248 (1969).

[18] Warren J. Wicker, "The Prohibition Against Self-Dealing," *School Law Bulletin* 11, no. 2 (April 1980).

[19] N.C. GEN. STAT. § 14-234 was codified in 1825; N.C. GEN. STAT. § 14-236 was enacted in 1897.

[20] Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960); Starmount Co. v. Ohio Sav. Bank and Trust Co., 55 F.2d 649 (4th Cir. 1932); Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955); State v. Debnam, 196 N.C. 740, 146 S.E. 857 (1929); State v. Williams, 153 N.C. 595, 68 S.E. 900 (1910); State v. Weddell, 153 N.C. 587, 68 S.E. 897 (1910); Davidson v. Guilford County, 152 N.C. 436, 67 S.E. 918 (1910); State v. Garland, 134 N.C. 749, 47 S.E. 426 (1904).

[21] Being merely employed by the party that contracts with the unit does not violate G.S. 14-234 [State v. Weddell, 153 N.C. 587, 68 S.E. 897 (1910)], nor even being married to the owner of the contracting firm [State v. Debnam, 196 N.C. 740, 146 S.E. 857 (1929)]. The public official must himself have some ownership in the contracting firm. But of course, a principal could violate G.S. 14-236 merely by being an employee of or accepting any financial reward from a firm that sells to the school system.

Although the conflict-of-interest statutes are stringent, they apply to only a narrow range of activity. Other conduct that is blameworthy or at least likely to be criticized by others is not prohibited by law. Principals must act in these areas of questionable though not illegal behavior according to their own personal standards of conduct, as well as follow school board policy, if there is one.

There is substantial question in particular about accepting presents or favors from people who do or would like to do business with the schools. G.S. 14-236 (which makes acceptance of gifts given for influencing business choices a crime) prevents obvious cases of abuse. But that leaves unsettled the majority of gift-giving situations between business and school personnel—those in which the line between friendship and a corrupt business relationship is not entirely clear, least of all in the minds of the people involved. The *American School Board Journal* has called the giving of gifts from salesmen to school personnel "unsavory and unbusinesslike, if not out-and-out unethical," but reported that it is common practice.[25] The article cited a survey in which 75 per cent of the superintendents sampled and 100 per cent of the principals said they had been offered gifts.[26]

A related problem is the use by school employees of materials or labor that belong to the school. Examples are auto repair classes that service a principal's car, cosmetology classes that cut teachers' hair, cafeteria leftovers being given to employees rather than left to spoil. The first two might be appropriate *if* the services were made available to the general public as well; the last is inappropriate because the benefit goes to a selected few school workers.

In 1977 a Commission to Revise the Public School Laws, appointed by the North Carolina General Assembly, recommended legislation on these subjects. The Commission's suggested language was as follows:

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[22] They will be—State v. Williams, 153 N.C. 595, 68 S.E. 900 (1910).

[23] The answer is "nothing." The State Supreme Court has said, "In entering into such contract [with his own firm] a public official acts at his own peril and must suffer the loss incident upon his breach of his public duty . . . . In other words, this Court will not recognize or permit any recovery bottomed on the criminal conduct of a public official." Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

[24] State v. Williams, 153 N.C. 595, 68 S.E. 900 (1910).

[25] Monks, "All About School People Who Accept Gifts from School Suppliers and Manufacturers," *The American School Board Journal* 31 (April 1974).

[26] It should be noted that this research was not concentrated on North Carolina. The superintendents surveyed were a national sample (1,000 with about 400 responding). The 37 principals interviewed were from the Midwest.

(a) No employee of a board of education shall obtain for his personal use or benefit any item belonging to the administrative unit or any service provided by the administrative unit other than an item or a service provided to the general public.

(b) No employee of a board of education shall accept gifts for his personal use or benefit from any person, group, or entity doing, or desiring to do, business with the administrative unit. All business-related gratuities are prohibited except nominal value advertising items widely distributed.[27]

Similar language applicable to school board members was part of the same bill. The General Assembly adjourned without considering the bill and has not considered it since. Thus observance of these standards is not now and may never be required by state law. Still, each principal can probably best protect his integrity and reputation by adopting a personal standard similar to the Commission's recommendations.

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[27] S 788, 1977 General Assembly of North Carolina.

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Cover design by Sarah S. McMillan